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No. 83-

In The

Supreme Court of The United States

October Term, 1983

THE FORMALDEHYDE INSTITUTE, INC. and BORDEN, INC.,

Petitioners,

v.

ALFRED L. FRECHETTE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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August 29, 1983

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QUESTIONS PRESENTED

1. Whether, under the Due Process Clause of the Fourteenth Amendment, a state statute may be applied by a state administrative agency to ban a product and to impose retroactively automatic and onerous remedial obligations for past lawful sales without ever providing an adjudicatory hearing.

2. Whether, under the Due Process Clause of the Fourteenth Amendment, a state administrative agency may ban a product as hazardous and order its repurchase at great expense without having a rational basis for finding that the product may cause any actual harm.

PARTIES BELOW

The parties to the appeal below were:

Appellant: Massachusetts Commissioner of Public Health

Appellees: Berkshire Gas Company
Borden, Inc.
C.P. Chemical Company, Inc.
The Formaldehyde Institute, Inc.

STATEMENT REQUIRED BY RULE 28.1

In addition to wholly-owned subsidiaries, petitioner Borden, Inc. has the following subsidiaries and affiliates:

Alba Nordeste S.A. Industrias Quimicas
Borden Chemical Malaysia
Borden Chile Limitada
Borden France S.A.
Borden International Packaging Ltd.
Borden International Philippines
Bordex Nederland B.V.
Broex S.A.
Clover Brand Dairies, Inc.
Compania Casco S.A.I.C.
Compania Quimica Borden S.A.
Crecspan S.A.
Demer S.A.
Estudios Marketing Internacional S.A.
Estudios Y Servicios Tecnicos Empresariales S.A.
Feslente Boniface S.A.
Gallina Blanca S.A.
Galloway-West Co., Inc.
Grand Bahama Dairy Products Ltd.
Hitachi Borden Chemical Products, Inc.
Hong Kong Snack Food Company Limited
John Robt. Powers Attractions, Inc.
Kerry Cheese-Tek Limited
Klemme GmbH & Co. K.G.
Korea Borden Chusik Hoesa
Lactaria Costarricense S.A.
Las Amigas del Pueblo S.A.
Latin America Agribusiness Development Corp.
Materiales Moldeables S.A. de C.V.
Meiji Borden
Monochem, Inc.
Nassau Dairy Products Ltd.
Naturin S.A.
Preparados Alimenticios S.A.
Productos Donita, Inc.
Productos Quimicos Y Alimenticios
Quimica Borden Ecutoriana
Quimica Borden S.A. de C.V.
The Viking Engraving Corp.
Thompack B.V.
TRL S.A.
Trinidad Processing Company Ltd.

Petitioner The Formaldehyde Institute, Inc. is a trade association. The following persons are members of The Formaldehyde Institute, Inc.:

Acme Resin Corporation
Adhesives & Sealant Council
American Apparel Manufacturers Association
American Cyanamid Company
American Paper Institute
American Plywood Association
American Textile Institute
Ashland Chemical Company
BASF-Wyandotte Corporation
Bohemia, Inc.
Boise-Cascade Corporation
Borden, Inc.
Burlington Industries
Celanese Corporation
Celotex Corp.
Champion International Corporation
Collins Pine Company
Dan River, Inc.
E.I. du Pont de Nemours & Co.
Embalmers Supply Company
Georgia-Pacific Corporation
Getty Oil Company
Hardwood Plywood Manufacturers Association
ICI Australia Operations Pty. Ltd.
Inda-Association of the Nonwoven Fabrics Industry
International Minerals & Chemical Corporation
Koppers Company, Inc.
Levi Strauss & Company
Liberty Homes, Inc.
M. Lowenstein Corp.
Man-Made Fiber Producers Association
Manufactured Housing Institute
Masonite Corporation
Medford Corporation
Milliken Research Corporation
Monsanto Plastics & Resins Company
National Cotton Council of America
National Forest Products Association
National Particleboard Association
Occidental Chemical Corporation
Perstorp, Inc.
Plastics Engineering Company
Plastics Manufacturing Company
Plum Creek Lumber Company
Ponderosa Products, Inc.
Potlatch Corporation
Proctor Chemical Company, Inc.
Pyneboard Pty. Ltd.
Ralph Wilson Plastics Company
Recreation Vehicle Industry Association
Reichhold Chemicals, Inc.
Schult Homes Corporation
Sun Chemical Corporation
The Carpet and Rug Institute
The Dodge Chemical Company
The Society of Plastics Industry
Union Camp Corporation
West Point Pepperell
Western Manufactured Housing Institute
Weyerhaeuser Company
Willamette Industries, Inc.
Wright Chemical Corporation

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**The Appendix to the Petition for a Writ of Certiorari has been separately bound, pursuant to Rule 36. The several appendices contained therein will be cited as A 1* et seq., *B 1* et seq. *and so forth.*

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OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court (A 1) is reported at 388 Mass. 707, 448 N.E.2d 367 (1983). The order of the Supreme Judicial Court denying the petition for rehearing (B 1) and the opinion of the Superior Court (C 1) are unreported.

JURISDICTION

The decision of the Massachusetts Supreme Judicial Court was entered on April 12, 1983. A timely petition for rehearing was denied on June 1, 1983. B 1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV: ". . . [N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ."

Pertinent provisions of the Massachusetts Hazardous Substances Labelling Act, MASS. ANN. LAWS ch. 94B, § 1 *et seq.*, (Law. Co-op. 1975), and of the relevant state regulations are reproduced in the Appendix. D 1-4, E 1-45.

STATEMENT OF THE CASE

This petition is brought to obtain review of a decision of the Supreme Judicial Court of Massachusetts. That decision sustained the constitutionality of an administrative proceeding conducted by the Massachusetts Department of Public Health ("the Department"). In a non-adjudicatory proceeding, the Department reviewed the potential hazard of the insulating material, urea-formaldehyde foam insulation ("UFFI").[1] The Department subsequently banned UFFI and required the product to be repurchased (removed) from houses into which it had been installed.[2]

Petitioners[3] requested but were denied an adjudicatory hearing before the Department. Petitioners were not permitted to cross-examine witnesses against them, to fully present evidence on their

[1]UFFI has been used extensively as an insulating material for buildings in Europe since at least 1958. Its use in this country developed after the Arab oil embargo in 1974, and it has since been used to insulate some 400,000 homes. UFFI has been found an attractive insulator because it can be injected into walls of existing structures, and thus is well suited for retrofitting older buildings. A 6.

[2]Under the repurchase regulations, ultimate responsibility for the costs of removal rests with the manufacturer of the components of the foam insulation. Any installer or distributor which pays the costs of removal may demand reimbursement for such costs from the manufacturer of the chemical components. E 42-43.

[3]Petitioner Borden, Inc. manufactured the components of a urea-formaldehyde foam insulation marketed under the tradename Insulspray. Borden Inc. sold the components to distributors who in turn sold them to installers. The installers prepared UFFI at the job site by mixing a liquid resin, a foaming agent, and compressed air. The resulting foam was injected into the walls of the building being insulated, where it solidifies. A 6-7.

(Footnote continued on next page.)

behalf or even to determine the reliability of "facts" relied upon by the Department in rendering its decision. In addition, the Department failed to advise petitioners of its position that the burden rested with them to prove that the product was not hazardous, rather than with the Department to prove that the product was hazardous.

Moreover, the Department had no factual basis for concluding that formaldehyde—a substance found in all human environments—was "hazardous" regardless of level of exposure or that UFFI emitted formaldehyde in amounts that presented an imminent danger to the public health. Virtually all chemical substances in commerce may cause some adverse effect at some level in some individuals. If the Department acted properly here, a State could ban virtually any substance without relation to actual harm, or more scientifically, to a level of exposure that is likely to produce a significant risk of injury. The Massachusetts ban and repurchase regulations are operative *regardless* whether any formaldehyde is released from UFFI and *regardless* whether any that is released has any perceptible effect upon human health or comfort.

For these reasons, the Department's action in banning UFFI and requiring its repurchase (removal from houses) was irrational and deprived petitioners of property without due process of law.[4]

(Footnote continued from previous page.)

Petitioner The Formaldehyde Institute, Inc. is an association whose members represent all phases of the formaldehyde industry. Its business members include manufacturers and distributors of formaldehyde; manufacturers and distributors of resins and adhesives containing formaldehyde; and industrial users who manufacture and distribute a wide variety of products utilizing formaldehyde.

[4]The Department's decision to ban UFFI based on its lack of knowledge about formaldehyde is dramatically at odds with the actions of four federal agencies—the Environmental Protection Agency (no action, under section 4(f) of the Toxic Substances Control Act, 15 U.S.C. §2601 *et seq.*, necessary because "there is no significant risk of serious or

(Footnote continued on next page.)

1. Administrative Proceedings

The Massachusetts Department of Public Health began an investigation of the alleged hazards of UFFI in the summer of 1978. The concern that led to the Department's investigation was the allegation that the insulation emitted formaldehyde.[5] The Department first concluded that formaldehyde (from all sources) at concentrations below 0.1 parts per million did not cause problems and probably did not cause problems at concentrations below 0.5

(Footnote continued from previous page.)
widespread harm to human beings" from formaldehyde, February 10, 1982), the Occupational Safety and Health Administration (denied a petition for an emergency temporary workplace standard to lower the current 3 ppm limit for formaldehyde, February 3, 1982), the Food and Drug Administration ("no regulatory action against the use of formaldehyde . . . is necessary at this time to protect the public health," Talk Paper—Formaldehyde, June 17, 1982), and the Department of Housing and Urban Development (.4 ppm level for formaldehyde in manufactured housing would provide "reasonable protection to manufactured home occupants," 48 Fed. Reg. at 37137, August 16, 1983); and with the decision of the Fifth Circuit in Gulf South Insulation v. CPSC, 701 F.2d 1137 (CA 5), reh'g denied, No. 82-4218 (June 23, 1983), striking down the CPSC's ban of UFFI. The court of appeals found that there was no credible evidence to support a conclusion that there is a health risk at the level of formaldehyde shown to exist in UFFI houses. *See* pages 18, 21, *infra*. Mandate in the case was issued on August 25, 1983. The CPSC has announced that it will not seek a writ of certiorari from this Court. The New York Times, August 26, 1983, page A1.

[5]Formaldehyde is a colorless gas consisting of carbon, hydrogen, and oxygen that is present naturally throughout the human body and in the atmosphere. It is a by-product of human metabolism and does not accumulate in the body. It is released continuously into the atmosphere through the photosynthesis of plant life and is present in such foods as potatoes, cabbage, and apples. Formaldehyde has been used commercially for more than 80 years, and over eight billion pounds are produced annually in this country for incorporation into such products as plywood, plastics, fertilizers, clothing, cleansers, paper, film, glues, preservatives, cosmetics, and deodorants. Its chief source in the ambient air is from the incomplete combustion of hydrocarbons. It is found in the emissions from industrial sources and houses that burn hydrocarbon fuels, as well as from automobiles, tobacco smoking, gas stoves and even heating of cooking oils. A 5-6.

ppm. C 7. The Department subsequently reversed itself and concluded that UFFI and formaldehyde at any level were dangerous. C 10, 17.[6]

On February 22, 1979, the Commissioner of the Department of Public Health ("the Commissioner") announced that hearings would be held in late March on a proposed ban of UFFI.[7] A 7. The Commissioner's stated purpose in holding hearings was not to determine whether UFFI was a hazardous substance, but rather to provide "an excellent forum to discover the wide spread health effects of [UFFI]." C 8. Prior to the commencement of the hearings, petitioners and others objected to the procedures outlined in the notice and requested but were denied an adjudicatory hearing. A 7-8.

Hearings were held on March 29 and 30, 1979. The case for the proponents of the ban was presented by the Secretary of the Executive Office of Consumer Affairs who offered and introduced the proponents' unsworn testimony. C 9-10. Petitioners were denied advance notice of the identity of these witnesses and were denied any opportunity to discover what these witnesses would

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[6]The trial court found that formaldehyde "is omni-present." C 2. In most indoor environments, formaldehyde levels of 0.05 to 0.2 parts per million are not uncommon. Formaldehyde has been measured at levels ranging from .005 to .008 in rural ambient air, to levels ranging up to .2 parts per million in urban outdoor air. C 3.

[7]The Commissioner purported to act pursuant to Massachusetts Hazardous Substances Labelling Act, MASS. ANN. LAWS ch. 94B, (Law. Co-op. 1975). D 1-4. The Commissioner is authorized to declare, "by reasonable rules and regulations," a substance to be hazardous which he finds is "toxic, corrosive, an irritant . . . if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use. . . ." *Id.* §§1, 2(a), D 1-2. The statute also provides that "if the commissioner finds that [a hazardous] article . . . presents an imminent danger to the public health and safety, he may declare the article to be a banned hazardous substance and require its removal from commerce." *Id.* §2(d). D 3.

say and the basis of their statements. C 9. Petitioners were not allowed to cross-examine any witnesses or even to review certain complaint files used to attempt to impeach the veracity of some industry witnesses. C 9-10. Under these circumstances, the fact that petitioners were permitted to make a limited presentation could not cure the basic unfairness of the Department's actions, because there was no way for petitioners to anticipate or rebut statements purporting to present facts in support of the ban.

On November 1, 1979, the Department issued regulations declaring formaldehyde and UFFI to be toxic and hazardous substances in any quantity, banning the sale of UFFI, and requiring its repurchase (removal) from houses into which it had been installed.[8] E 1-45. These actions were predicated on the industry's alleged failure to sustain its previously unannounced burden of proving that there is a "safe" level of exposure to formaldehyde. C 10-11, 12.

After the present lawsuit was commenced, the Department stayed the repurchase regulations and further hearings were held on December 1, 1979, and August 1, 1980, to consider the repurchase provisions. Petitioners' motions for an adjudicatory hearing were again denied. No transcription of these proceedings was preserved. A 8, C 12. New repurchase regulations were issued on November 6, 1980. A 8. The revised regulations provided for an informal procedure whereby referees would review a written request for repurchase. The review is limited to whether the consumer owned a UFFI insulated building, whether the consumer reported the occurrence of certain health symptoms, and whether the named supplier furnished the UFFI for that building. The referees were not to determine the level, if any, of formaldehyde in the home, the source of any formaldehyde, or whether

[8]The trial court found that the "average cost" of repurchase pursuant to the regulations is between $12,000 and $14,000. In larger homes, the cost of repurchase would be as high as $25,000. A 31.

the health symptoms were caused by formaldehyde or UFFI.[9] Indeed, the referees were prohibited from accepting evidence on, or even considering, these issues. E 30-35, C 19.

2. Trial Court Proceedings

Petitioners brought declaratory judgment actions challenging the ban and repurchase regulations in the Superior Court of Suffolk County in November 1979. These suits were consolidated with three other cases and tried in September and October of 1981. The trial court issued its decision on January 18, 1982, striking down the regulations as arbitrary and capricious. C 16-20. The court also held that the Department was required to hold adjudicatory hearings prior to issuing the regulations. C 14, 20.

The trial court found the record devoid of any evidence that could rationally support the Department's action. The court catalogued the astonishing gaps in the record that left the Commissioner's regulations grounded only in "unsupported supposition." C 18. The Commissioner conceded that he did not know how many homes in Massachusetts were insulated with UFFI, A 27, what amount of formaldehyde was released into homes by UFFI, A 27, C 12, 17, or whether the level of formaldehyde present in homes insulated with UFFI differed materially from that in other homes. A 27, C 11, 17. The Commissioner acted "without any knowledge" whether the incidence of health symptoms among

[9]Under the revised regulations the consumer requesting repurchase need state only that he or another occupant has suffered "adverse health symptoms" after exposure to UFFI. The consumer need not allege, let alone prove, that UFFI caused such symptoms. E 26. If a named supplier requests review of the repurchase request, a physician's report is to be submitted which describes the occupant's "relevant medical history," lists the symptoms, *if any*, and states a diagnosis, *if any*. The physician need not be a treating doctor, need not make any diagnosis, and need not state that, in his opinion, the symptoms were caused by formaldehyde generally, let alone formaldehyde emitted from UFFI. E 30. (emphasis supplied).

persons living in UFFI insulated homes was higher or lower than among the general population or even what the incidence of these alleged symptoms was among persons in UFFI homes. C 6, 17-18.[10] Indeed, the evidence regarding the incidence of symptoms, introduced at trial, indicated that individuals living in homes insulated with UFFI experienced fewer health complaints than other persons. C 6. In light of these deficiencies, the trial court concluded that the Commissioner's actions in banning UFFI had been "rooted in ignorance, leaving important issues of causal connection and contribution and incident rates unanswered and, indeed, even unexplored" and were for that reason "irresponsible and totally arbitrary." C 17.[11]

3. The Decision of the Massachusetts Supreme Judicial Court

The Massachusetts Supreme Judicial Court granted direct appeals from the judgment of the trial court and reversed. The court first concluded that petitioners were not entitled either by state law or the Federal Constitution to an adjudicatory hearing prior to the issuance of the regulations. In the court's view, an adjudicatory hearing was required only where the State is determining the "legal rights, duties or privileges of *specifically named persons*." A 13 (emphasis supplied). Because petitioners had not been

[10]The trial court found that the Commissioner "could have caused an epidemiological study to have been [done] . . . but he elected not to compare the alleged health effects experienced by UFFI residents with the incidence rates for the general public." C 6.

[11]The trial court also concluded that the Commissioner had prejudged the issue whether UFFI is hazardous, based on a number of public statements made by the Commissioner prior to the hearings. C 7-8. The court further found that the Commissioner had unexpectedly shifted the burden of proof in the proceeding to petitioners and the industry without notice until after the regulations were issued. C 10, 12. The Supreme Judicial Court dismissed these findings as irrelevant in light of that court's conclusion that petitioners were not entitled to an adjudicatory hearing. A 28.

specifically named as parties in the administrative proceeding, the court concluded no hearing was required. A 13.

With respect to the repurchase obligation, the court held that the Federal and State Constitutions do require a hearing before repurchase could be ordered, because a request by a consumer that a specific supplier repurchase UFFI would affect the rights and duties of specifically named persons. A 14. The court, however, limited the hearing to a single issue—whether a named supplier in fact furnished the UFFI whose repurchase is sought. A 15-16. Because the court construed the statute to mandate repurchase once a product was banned, it reasoned that a hearing with respect to any issue other than the identity of the seller would be "gratuitous." A 16.

With respect to the substance of the regulations, the court ruled that the petitioners had failed to prove that "the commissioner lacked any conceivable, rational basis for the regulations." A 17. The court recognized that the Commissioner did not know the amount of formaldehyde that UFFI contributed to the indoor environment, did not know how the levels of formaldehyde in UFFI houses compared with non-UFFI houses or how many people had been affected, and had not caused epidemiological studies to be made. A 27. The court, nonetheless, perceived a "conceivable" basis on which the Commissioner could find that UFFI would "*potentially in some conditions* emit formaldehyde" at levels affecting the most susceptible persons in the population. A 25, 28. (emphasis supplied). Finally, the court rejected petitioners' objection that the repurchase obligations were arbitrary insofar as they prevented petitioners from establishing that UFFI had not emitted formaldehyde in a house or that no occupant of a house had been affected. The court restated its conclusion that the ban itself foreclosed these issues inasmuch as the petitioners' unqualified obligation to repurchase was established by statute once the product was banned. A 28-29.

REASONS FOR GRANTING THE WRIT

Without according petitioners the minimal procedural safeguards to protect their property rights as required by the Constitution, the State of Massachusetts retroactively imposed upon petitioners severe remedial obligations for past lawful sales of a useful product. As a direct consequence of the Department's failure to provide an adjudicatory hearing, there was a total failure to develop a valid factual basis to support the ban and repurchase regulations. This failure rendered the State's action irrational and deprived petitioners of property without due process of law.

The decision of the Massachusetts Supreme Judicial Court sustaining the Department's action under these circumstances is contrary to the decisions of this Court and of the courts of appeals, and should be reversed.

I. The Decision of the Massachusetts Supreme Judicial Court that Petitioners Were Not Entitled to an Adjudicatory Hearing Is Contrary to the Decisions of This Court and of the Courts of Appeals.

In plainest terms, Massachusetts has imposed upon petitioners an unexpected and onerous retroactive liability for past lawful conduct. As applied, the regulations require petitioners to expend substantial sums to repurchase and remove from existing buildings a product that is alleged to be hazardous. This determination was made without ever affording an adjudicatory hearing to determine if the product creates any hazard whatever. The Constitution does not permit property to be so destroyed or taken without the procedural safeguards that were denied petitioners.

The requirement that UFFI be repurchased and removed from buildings at considerable expense obviously deprives petitioners of property protected by the Constitution. Petitioners' common law property interests were expressly expanded, moreover, by the substantive protections provided by the state statute under which

the Commissioner purported to act in this case. Chapter 94B of the General Laws of Massachusetts provides, in part, that substances may be banned as hazardous only if it is determined that they "may cause substantial personal injury or substantial illness" as a result of their foreseeable use. MASS. ANN. LAWS ch. 94B, §1 (Law. Co-op. 1975). Numerous decisions of this Court establish that private expectations grounded in state law, which cannot be terminated except for "cause," create property or liberty interests to which the guarantee of procedural due process applies. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Vitek* v. *Jones*, 445 U.S. 480, 487-490 (1980); *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 11-12 (1978); *Board of Regents* v. *Roth*, 408 U.S. 564, 576-578 (1972); *see also Arnett* v. *Kennedy*, 416 U.S. 134, 165-166 (1974) (Powell, J., concurring in part).

Because Massachusetts has deprived petitioners of property, the Fourteenth Amendment obliged the State to afford them "an opportunity . . . granted at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965), "for [a] hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). It is equally plain that petitioners' procedural rights could not be defeated by the mere formalism advanced by the Massachusetts Supreme Judicial Court, that petitioners were not specifically named as parties to the administrative proceeding, and thus were entitled only to the lesser process accorded in this case. "[B]ecause 'minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions of adverse official action.' " *Logan* v. *Zimmerman Brush Co.*, *supra*, 455 U.S. at 432, quoting *Vitek* v. *Jones*, *supra*, 445 U.S. at 491.

Measured against the constitutional standard, it is apparent that petitioners were denied due process. This Court has held that

the determination of the requirements of due process in a given case depends upon the consideration of three distinct factors—the nature of the private interest affected by the official action; the value of specific procedures in safeguarding the private interest against erroneous or arbitrary deprivation; and the government's interest in administrative efficiency. *Mathews* v. *Eldridge*, 424 U.S. 319, 334-335 (1976); *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961).

Here, there is no question that the ban and repurchase regulations directly and adversely impacted on the private rights of petitioners. Likewise, the right of cross-examination was critical since its use in the trial below provided the basis for upsetting the ban and repurchase regulations. Moreover, governmental efficiency would not have been impaired by providing an adjudicatory hearing due to the limited number of component manufacturers—those firms ultimately responsible under the repurchase provisions. Thus had the Massachusetts court undertaken the inquiry required by this Court's decisions, it would have found that each of the relevant considerations indicates that an adjudicatory hearing was mandated.

A. The Determination of Individualized and Onerous Obligations in This Case Required an Adjudicatory Hearing.

The Commissioner's ban and repurchase regulations have imposed onerous retroactive liability on petitioners. Estimates of the cost of removing UFFI from an existing home range from $12,000 to more than $20,000—some ten times its original cost. A 31. These retroactive obligations were imposed, moreover, upon a small and identifiable number of companies.[12] Thus,

[12]As the trial court wrote, the "targeted group" was a "relatively small group of manufacturers. . . . Installers and distributors were permitted under the regulations to pass on . . . liability in whole to the makers." C 15.

despite its denomination as "legislative" by the Massachusetts court, the proceeding turned on determinations of particularized fact and ended in orders that were "individual in impact and condemnatory in purpose." *Appalachian Power Co.* v. *EPA*, 477 F.2d 495, 501 (CA 4 1973). The decisions of this Court make clear that where a small number of individuals are thus exceptionally affected, they cannot be deprived of their property without an adjudicatory hearing. *See, e.g., Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 304-305 (1937); *FCC* v. *WJR, The Goodwill Station*, 337 U.S. 265 (1949); *see also Londoner* v. *Denver*, 210 U.S. 373, 385 (1908).

The impermissibility of denying petitioners an adjudicatory hearing is particularly clear in view of the retroactive nature of the liability imposed on petitioners through the repurchase regulations. As the court construed the state statute, the repurchase obligation arose automatically from the ban. But so read, the statute denies petitioners an adjudication at any time, before or after their property is destroyed.[13] Even if it were arguable that Massachusetts could prospectively ban the sale of UFFI within the State without an adjudicatory hearing, automatically placing onerous and unexpected liabilities on petitioners without a hearing to adjudicate the facts required by statute is a flagrant violation of due process. In sustaining these repurchase procedures, the court disregarded not only the distinction consistently observed in administrative law between legislative-type rules of prospective effect and adjudications that are frequently

[13]These manifestly inadequate procedures will not be cured by the limited hearing provided at the time a consumer requests repurchase of UFFI. That hearing, as noted, is confined to the issue whether the named manufacturer supplied the UFFI whose repurchase is sought. The referee conducting the hearing is not permitted even to consider whether the UFFI has emitted formaldehyde into the house or whether the UFFI has caused or threatened any health effects whatever—precisely the factual issues that required an adjudicatory hearing in this case.

retrospective,[14] but also the admonition of this Court that due process should be more exacting of official actions with retrospective effects. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

Unlike the Massachusetts court, the District Court in *Springs Mills, Inc.* v. CPSC, 434 F.Supp. 416 (D.S.C. 1977), correctly applied the principles of this Court's decisions in circumstances very similar to those in this case. The court in that case concluded that the CPSC had acted impermissibly in promulgating a ban of a flame retardant material without an adjudicatory hearing. The court reasoned that the repurchase obligations that flowed from the ban, like those in this case, were among the "most drastic procedures known to law," *id.* at 430, and warranted the safeguards of an adjudicatory hearing fully as much as the property interests at issue in other cases where a hearing has been found necessary. *Id.* at 430, citing *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). The court construed the statute under which the CPSC had acted as requiring an adjudicatory hearing, and so avoided "a finding that Congress had enacted a patently unconstitutional law." *Id.* at 432. The court concluded that any other construction of the statute—one that would deprive persons of "millions of dollars without a hearing, without notice of a hearing, without an opportunity to present evidence, without the opportunity to cross-examine and otherwise test the credibility and validity of evidence presented . . . would be unthinkable." *Id.* at 432-433. The Massachusetts statute in this case, as construed by the State's highest court, likewise cannot be sustained.

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[14]Indeed, the laws of Massachusetts relied on by the court recognize the distinction. MASS. ANN. LAWS ch. 30A, §1 (Law. Co-op. 1983) (defining a regulation as "the whole or any part of every rule, regulation, standard or other requirement of *general application and future effect*. . . .") (emphasis supplied).

B. An Adjudicatory Hearing, with Opportunity for Cross-Examination, Was Essential in View of the Discrete and Individualized Facts on Which the Administrative Action Rested.

Numerous decisions of this Court have established that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970). Nothing in the language or intent of the Fourteenth Amendment exempts administrative action in a commercial context from this elemental principle, as is demonstrated by the numerous decisions of this Court and the courts of appeals following *Londoner* v. *Denver*, 210 U.S. 373, 385 (1908). *See, e.g., Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292, 304-305 (1937); *FCC* v. *WJR, The Goodwill Station*, 337 U.S. 265 (1949); *Illinois* v. *United States*, 666 F.2d 1066 (CA 7 1981); *see also* 1 K. Davis, *Administrative Law Treatise* § 7.02 (1958).

The Massachusetts court disregarded the settled principle that an adjudicatory hearing is required where adverse administrative action turns upon discrete and individualized factual determinations, sometimes characterized as "adjudicative facts." *See United States* v. *Florida East Coast Railway Co.*, 410 U.S. 224, 245 (1973); *Northern California Power Agency* v. *Morton*, 396 F. Supp. 1187 (D.D.C. 1975), *aff'd sub nom. Northern California Power Agency* v. *Kleppe*, 539 F.2d 243 (CA DC 1976); 1 K. Davis, *Administrative Law Treatise*, *supra* at § 7.02.

The administrative proceeding in this case was plainly defined by state statute as concerned with specific narrow and individualized facts. As the trial court observed, "[t]he act mandates that specific findings by the Commissioner be made on the only relevant issue; to wit, the degree of hazard, if any, the [product] presents." C 14-15. The court noted that the factual determination of hazardousness depended in turn upon a number of

facts even more specific to particular manufacturers, including petitioner Borden, Inc., C 15:

> As such the question focuses directly upon the nature and characteristics of the product and its manufacturing formulas, the standards, if any, utilized in its manufacture, storage, handling and shipping, the standards and customs of its distribution, its shelf life, the installation practices and procedures, licensing feasibility, its labeling and warning suitabilities. Therefore, although broad in scope, the scrutiny is narrow in its application, being limited to a particular item and the inquiry to determine and find the facts regarding its degree of hazard, if any, that the article possesses.

Petitioners repeatedly tried in the administrative proceeding to raise such specific questions of fact, but were foreclosed by the informal procedures in this case. *See Budnicki* v. *Beal*, 450 F. Supp. 546, 554-555 (E.D. Pa. 1978).

The informality of the administrative proceedings defeated petitioners' expectation that the statutory preconditions would be rationally decided. The Department relied almost exclusively on unsworn statements of consumers complaining of personal health effects allegedly caused by the product. Without opportunity to confront and cross-examine the complaints made against them, petitioners were unable to establish such critical facts as whether these alleged symptoms had been diagnosed, whether they may have predated the installation of UFFI, and whether they may have been caused by other factors, such as diseases (viruses or bacteria), smoking, or a variety of common household materials. These were questions of quintessential adjudicative fact. It is inconceivable that such issues of causation and threatened injury, where predicating substantial personal liability, would be remitted to casual procedures in cases of tort or nuisance which the proceedings in this case so closely resembled.

Adjudicatory procedures were particularly necessary in this case in view of the complicated and highly speculative scientific evidence that was presented. Petitioners might have been saved

from the Commissioner's arbitrary result had they been allowed the opportunity they were due to confront and cross-examine the witnesses whose theories evidently swayed the Commissioner. *Cf. Mathews* v. *Eldridge*, *supra*, 424 U.S. at 343. As the Ninth Circuit has stated, where "the issue . . . is of a highly complex and technical nature [and] cross-examination will help crystalize the varying contentions of the experts, . . . [f]airness may dictate cross-examination on crucial issues," even though none may be required by statute. *Bunker Hill Co.* v. *EPA*, 572 F.2d 1286, 1305 (CA 9 1977). *See also O'Donnell* v. *Shaffer*, 491 F.2d 59, 62 (CA DC 1974); *Northern California Power Agency* v. *Morton*, *supra*, 396 F. Supp. at 1193.

C. The Denial of Petitioners' Right to an Adjudicatory Hearing Cannot Be Justified by Administrative Convenience.

The Court has stated that in determining whether due process requires an adjucatory hearing, the public interest in avoiding unnecessary administrative and fiscal burdens must be considered. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 347. In this case no unreasonable burden would have resulted had petitioners been afforded a fair hearing. The trial court found, and the Supreme Judicial Court did not dispute, that as in *Londoner* v. *Denver*, *supra*, the administrative proceeding in this case affected an "easily identifiable and non-diverse" group of persons. C 16. Not only does this fact reinforce the inescapable conclusion that the proceeding was an adjudication of individual and discrete facts, but the small number of manufacturers directly affected suggests strongly that "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail" would not be substantial. *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 335. *See also Mobil Alaska Pipeline Co.* v. *United States*, 557 F.2d 775, 805 (CA 5 1977) (Roney, J., dissenting). In view of the limited number of affected parties, neither the length nor the cost of the Department's proceeding would have been significantly

increased by providing petitioners the opportunity for cross-examination of the allegations against them. Indeed, the trial court expressly found that an adjudicatory proceeding would be readily feasible in the circumstances of this case. C 14-16.

The feasibility of an adjudicatory hearing is further demonstrated by the recent Fifth Circuit decision striking down the Consumer Product Safety Commission's ban on UFFI, and holding that the Commission's failure to conduct a prior adjudicatory hearing was not excused by the Commission's finding that less formal proceedings would be in the public interest. *Gulf South Insulation* v. *CPSC*, 701 F.2d 1137, 1149-1150 (CA 5), *reh'g denied*, No. 82-4218 (June 23, 1983). "The selection of procedures," wrote the court, "is too important to be based on unexplored theories and desires for administrative convenience." *Id.* at 1150. The Department's refusal here to afford petitioners an adjudicatory hearing, likewise motivated by nothing more than administrative convenience, cannot be sustained.

II. The State's Action in Banning UFFI and Ordering Its Repurchase Subjects Petitioners to Irrational and Arbitrary Governmental Action.

The Massachusetts statute as applied by the Commissioner also violates the Fourteenth Amendment because the Commissioner lacked any rational basis for his actions. The Supreme Judicial Court acknowledged the gaping deficiencies in the administrative record, but excused the obvious lack of a rational foundation for the Commissioner's actions by merely concluding that there was a "conceivable" basis for believing that UFFI would "potentially in some conditions" emit formaldehyde at levels affecting the most susceptible people in the population. A 25, 28. Such generalized speculation does not satisfy the due process requirements for banning UFFI and ordering its repurchase.

The ambit of permissible state regulation is concededly quite broad. But "[w]hile the legislative judgment on economic and business matters is well-nigh conclusive . . . it is not beyond judicial inquiry." *Poe* v. *Ullman*, 367 U.S. 497, 518 (1961) (Douglas, J., dissenting). This Court has repeatedly recognized that the "rational-basis standard is 'not a toothless-one,' " *Schweiker* v. *Wilson*, 450 U.S. 221, 234 (1981), quoting *Mathews* v. *Lucas*, 427 U.S. 495, 510 (1976), and under that standard has recently invalidated state action that was patently irrational. *Zobel* v. *Williams*, 457 U.S. 55 (1982); *Logan* v. *Zimmerman Brush Co.*, *supra*, 455 U.S. 422. Exercising such substantive review, albeit limited, is especially appropriate where, as here, the actions alleged to be arbitrary are those of unelected officials not subject to the democratic checks on governmental power that may justify the greater deference owed legislative enactments. *Cf. Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Co.*, ___ U.S. ___, ___ n.9, 51 U.S.L.W. 4953, 4956 n.9 (June 24, 1983) ("We do not view as equivalent the presumption of constitutionality afforded legislation drafted by Congress and the presumption of regularity afforded an agency in fulfilling its statutory mandate.").

This Court has long recognized that where a person's rights depend upon administrative findings of fact, officials cannot, consistent with the Due Process Clause, capriciously make those findings without some rational foundation. In *ICC* v. *Louisville & Nashville Railroad Co.*, 227 U.S. 88 (1913), the Court considered a challenge to an Interstate Commerce Commission order setting aside the railroad's rates. The Commission was permitted by statute to do so only where it found the rates to be unreasonable. *Id.* at 92. In rejecting the Commission's contention that its finding of unreasonableness was conclusive even if not supported by evidence, the Court stated, *id.* at 91:

> A finding without evidence is arbitrary and baseless. And if the Government's contention is correct, it would mean that the Commission had a power possessed by no other officer,

> administrative body, or tribunal under our Government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.[15]

The Massachusetts statute in this case, like the statute in *Louisville & Nashville Railroad Co.*, *supra*, authorized administrative action only upon findings of certain facts. Because the Commissioner's finding that UFFI was hazardous was not based upon facts that rationally support that conclusion, and because no other basis for his action has been advanced, those actions cannot be sustained. Courts may not defer to such irrational administrative conduct. "[A]n inquiry into the facts before the Commission, in order to ascertain whether its findings are thus vitiated, belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority." *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 277 (1933).[16]

The Massachusetts Supreme Judicial Court in this case failed to give the Commissioner's action even the minimal scrutiny required by the Constitution. As noted, the court conceded that the Commissioner did not determine the amount of formaldehyde contributed by UFFI, or the extent to which UFFI had affected the health of the occupants. A 27. Absolutely no scientific studies

[15] *See also* Southern Railway Co. v. Virginia, 290 U.S. 190, 197 (1933); Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co., 289 U.S. 266, 277 (1933). *Cf.* Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (CA DC 1973), cert. denied, 417 U.S. 921 (1974).

[16] *See* Gulf South Insulation v. CPSC, 701 F.2d 1137, 1149-50 (CA 5), reh'g denied, No. 82-4218 (June 23, 1983), wherein the Fifth Circuit recognized its obligation to scrutinize the record rather than blindly defer to the CPSC and thereby "abdicate [its] role in the regulatory process." *Id.* at 1150.

were used. C 4, 6, 17. The court nonetheless sustained the Commissioner's actions based on the scant evidence offered in the trial court, none of which was even considered by the Commissioner in promulgating the regulations and none of which could rationally be found to support his actions, even after the fact.

The irrationality of the Commissioner's action in this case is further demonstrated by the Fifth Circuit's recent decision vacating the Consumer Product Safety Commission's ban of UFFI. *Gulf South Insulation* v. *CPSC*, 701 F.2d 1137 (CA 5), *reh'g denied*, No. 82-4218 (June 23, 1983). The CPSC's ban was the result of a six year investigation into UFFI and was based upon a much more extensive record than was developed by the Department in Massachusetts. The Fifth Circuit set aside the ban, as did the trial court here, because the CPSC's finding that the use of UFFI posed an "unreasonable risk" to consumers was not supported by " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " 701 F.2d at 1143, quoting *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938). The court of appeals noted the agency's "failure to quantify the risk at the exposure level actually associated with UFFI." *Id.* at 1148. The same deficiency exists in this case.

The arbitrariness of the Department's action is all the more egregious because of the onerous retroactive liability to repurchase UFFI that has been imposed. Even if it could be argued that a prospective ban of UFFI could be sustained in this case, placing such a retroactive burden on petitioners cannot. In considering a due process challenge to federal legislation, the Court has said, "[i]t does not follow . . . that what Congress can legislate prospectively it can legislate retrospectively." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976). "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter

may not suffice for the former." *Id.* at 17.[17] *See also Daughters of Miriam Center for the Aged* v. *Mathews*, 590 F.2d 1250, 1259 (CA 3 1978) ("Retroactive measures—whether promulgated by a legislature or by an administrative agency—have traditionally been subjected to stricter scrutiny than have prospective measures.").

To base a regulation on a claim of health effects from a product, there must be a reasonable basis for concluding that the product causes the health effects, or at least a showing that the health effects occur with more than usual frequency in the presence of the product. There must be a basis for concluding that the alleged offending agent, formaldehyde, was emitted by the product and in quantities sufficient to result in the claimed health effects. There must also be a basis for concluding that the health effects, in this case symptoms characteristic of many common conditions, such as flu, were not the result of other factors in the claimant's medical history, and were more than a mere temporal coincidence. Here, the Department had no factual basis in the record for concluding that any of these circumstances existed, and therefore its action was irrational.[18]

There is, in short, no rational basis for either banning or ordering the repurchase of UFFI. And to excuse such an arbitrary imposition on general grounds of deference to state administrative officials, as the Massachusetts court did here, would leave petitioners completely without the protection of liberty and property that the Constitution secures to every person.

[17] In Turner the Court sustained a statute retroactively imposing on mine operators the obligation to compensate former employees disabled by black-lung disease because it concluded that the law was justified as a rational measure to spread the costs of those disabilities. 428 U.S. at 18. In this case, in contrast, no rational end is served by requiring the repurchase of a product that cannot reasonably be considered hazardous. No health effects were shown to be prevented or remedied by repurchase, and therefore it is not rational to charge petitioners with such unexpected liabilities.

[18] The trial court described the record in this case, itself incomplete, as "a huge gratuitous collection of unsworn written submissions and oral statements and urgings." C 16.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted and the decision of the Massachusetts Supreme Judicial Court reversed.

Respectfully submitted,

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No. 83-

In The

Supreme Court of The United States

October Term, 1983

THE FORMALDEHYDE INSTITUTE, INC. and BORDEN, INC.,

Petitioners,

v.

ALFRED L. FRECHETTE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

Opinion of the Supreme Judicial Court of Massachusetts

Supreme Judicial Court of Massachusetts

BORDEN, INC. *vs.* COMMISSIONER OF PUBLIC HEALTH
(and four consolidated cases[1]).

Suffolk. November 1, 1982.—April 12, 1983.

Present: HENNESSEY, C.J., WILKINS, NOLAN, LYNCH, & O'CONNOR, JJ.

Public Health. Hazardous Substance. Regulation. State Administrative Procedure Act. Administrative Law, Adjudicatory proceeding, Regulations, Administrative Procedure Act, Agency, Rule making, Judicial review.

When the Commissioner of Public Health, on the basis of his determination that urea formaldehyde foamed-in-place insulation and the chemical formaldehyde are hazardous substances, adopted regulations pursuant to G. L. c. 94B, §§ 1, 2, and 8, banning the sale, distribution, and all uses of urea formaldehyde foamed-in-place insulation and requiring suppliers of such insulation, on request, to remove it from buildings in which it had been installed and to refund the purchase price, he was not required to hold an adjudicatory hearing, either by reason of language in G. L. c. 94B, § 2, requiring conformity to Federal regulations [ ], or by reason of any provision in the State Administrative Procedure Act [ ].

Where the Commissioner of Public Health adopted regulations pursuant to G. L. c. 94B, §§ 1, 2, and 8, requiring suppliers of

[1]Aerolite SPE Corporation & others *vs.* Commissioner of Public Health. Formaldehyde Institute & others *vs.* Commissioner of Public Health. Anderson Foam Distributors & others *vs.* Commissioner of Public Health. The Berkshire Gas Company *vs.* Commissioner of Public Health.

urea formaldehyde foamed-in-place insulation to remove such insulation from buildings in which it had been installed and to refund the purchase price, the Commissioner was required, by G. L. c. 30A, the State Administrative Procedure Act, as well as by due process principles, to provide an adjudicatory hearing procedure to determine whether a named supplier had furnished particular insulation with respect to which removal and repurchase were sought. [ ]

Discussion of the principles of law governing judicial review of regulations adopted by governmental agencies. [ ].

In an action by manufacturers and distributors of urea formaldehyde foamed-in-place insulation seeking a declaration that regulations adopted by the Commissioner of Public Health pursuant to G. L. c. 94B, §§ 1, 2, and 8, banning the sale, distribution, and all uses of such insulation were invalid, the plaintiffs failed to prove that the Commissioner lacked any conceivable rational basis for the regulations. [ ]

Suppliers of a type of building insulation which was later identified in regulations of the Commissioner of Public Health as a banned hazardous substance had an absolute obligation under G. L. c. 94B, § 8, to repurchase the product under regulations adopted by the Commissioner, and were not entitled to show, in the case of individual installations, that the insulation had not had harmful effects. [ ]

General Laws c. 94B, § 8, permits the Commissioner of Public Health to require by regulation that a product banned as a hazardous substance be repurchased by any supplier in the chain of supply, with the purpose that the final obligation falls on the manufacturer or importer who introduced the product. [ ]

Regulations of the Commissioner of Public Health respecting the removal and repurchase of urea formaldehyde foamed-in-place building insulation, which the Commissioner determined to be a hazardous substance, appropriately provided for removal costs to be passed along the chain of supply to the manufacturer of the product. [ ]

The evidence in an action challenging the validity of regulations of the Commissioner of Public Health banning, as a hazardous substance, urea formaldehyde foamed-in-place building insulation revealed a rational basis for the Commissioner's conclusion that the product tripolymer falls within the generic category of formaldehyde insulation products and poses a health hazard through release of formaldehyde into the air. [ ]

Procedures by which the Commissioner of Public Health adopted regulations banning urea formaldehyde foamed-in-place building insulation as a hazardous substance did not support the contention that the Commissioner had prejudged the issues respecting this product. [ ]

In an action challenging the validity of regulations of the Commissioner of Public Health banning urea formaldehyde building insulation as a hazardous substance, the judge should have admitted the Commissioner's proffered evidence respecting the product's carcinogenicity, as tending to show a rational basis for the regulations, notwithstanding the Commissioner's statement that, in deciding to ban the product, he did not rely on evidence of its carcinogenicity. [ ]

Regulations of the Commissioner of Public Health requiring repurchase of a product determined by him to be a hazardous substance violated neither the due process clause nor the con-

tract clause of the United States Constitution [ ], nor did the absence from the regulations of a chemical definition of the product render them unconstitutionally vague [ ].

CIVIL ACTIONS commenced in the Superior Court Department, two on November 16, 1979, and one each on May 9, 1980, February 9, 1981, and July 31, 1981.

The cases were heard by *Ronan*, J.

The Supreme Judicial Court granted requests for direct appellate review.

Stephen S. Ostrach, Assistant Attorney General (*Gerald J. Caruso*, Assistant Attorney General, with him) for Commissioner of Public Health.

John J. Curtin, Jr. (*Michael W. Davis*, of Illinois, with him) for Borden, Inc.

Joseph L. Kociubes (*Alexandra Leake* with him) for Formaldehyde Institute.

Michael S. Marcus, of Washington D.C., for C.P. Chemical Company, Inc.

Wendell J. Leary for Berkshire Gas Company.

NOLAN, J. These appeals raise numerous procedural and substantive facial challenges to regulations issued by the Commissioner of the Department of Public Health (commissioner), banning the sale, distribution, and all uses of urea-formaldehyde foamed-in-place insulation (UFFI) in the Commonwealth (ban regulations), and requiring the manufacturers, dealers, and installers of UFFI to remove it from any building where it was in-

stalled, restore the house, and refund the purchase price (repurchase regulations). The commissioner's regulations were based on his findings that formaldehyde and UFFI were toxic, irritant, hazardous substances and that the potential for release of formaldehyde from UFFI into the indoor environments of buildings in which it is used as insulation justified its ban. In promulgating these regulations, the commissioner purported to act under the authority granted him by G. L. c. 94B. After trial, a judge of the Superior Court invalidated the regulations in their entirety. The two main challenges concern whether the Commissioner was required to hold adjudicatory hearings prior to issuing the regulations and whether the regulations are illegal, arbitrary, or capricious. We reverse the judgments of the Superior Court and uphold the commissioner's regulations with the exception detailed below. Other issues raised on this appeal will be set forth as they are treated in this opinion.

1. *General background.* The trial judge made the following findings. Formaldehyde is a colorless, gaseous compound of carbon, hydrogen, and oxygen. It is present, with other aldehydes, in the atmosphere, where it is continuously introduced through natural processes of photochemical generation in plants. Automobiles also inject formaldehyde into the atmosphere as a by-product of the incomplete burning of hydrocarbon fuels. It is produced by emissions from industrial and power plants, by smoking, by the use of gas stoves, and even by the heating of cooking oils. Formaldehyde is found in fruits and vegetables such as apples and potatoes. Formaldehyde is also found in mammals; it is produced in the human system during metabolism but it does not accumulate. It is probable that ambient levels of formaldehyde are greater in urban than in rural environments.

Formaldehyde is the most commercially significant form of the aldehydes. About half of the eight billion pounds produced annually in this country is used in the preparation of urea-formaldehyde and phenol formaldehyde resins. These resins are useful for their bonding properties, and they are used in the production of plywood, particle board, and a wide variety of molded or extruded plastic items. Another twenty-five per cent of the formaldehyde produced is used in disinfectants, textile treatment agents, leather processing, and dye manufacture. Formaldehyde is also a constituent of fertilizers, fungicides, clothing, cleansers, waterproofing, fur, wood and leather preservers, lacquers, varnishes, paper, film, glues, drugs, cosmetics, and deodorants.

The use of UFFI as an insulation material began in Europe in 1958. While it was used extensively in northern Europe in the 1960's, its use did not develop in this country until after the Arab oil embargo in 1974. It was marketed with increasing success until 1978 when there was a significant decrease in sales. Some 400,000 houses in the United States have been insulated with UFFI. Approximately 1,260 houses in Massachusetts have been insulated with Insulspray, a trade name for one of the UFFI products here at issue, and some 860 with Tripolymer, a trade name for another product involved here. The number of houses in Massachusetts insulated with other UFFI products is unknown.

The advantages of UFFI are that it is efficient, easy to handle and transport, and relatively inexpensive. The average cost of insulating a seven room house with UFFI ranges from $1,200 to $1,400. UFFI is comprised of three main ingredients: a polymerized urea-formaldehyde resin, a foaming agent called a surfactant, and air. These ingredients are mixed at the job site using portable equipment. The foaming agent is pumped into a mixing or foaming gun where it is mixed with air to form small bubbles.

These bubbles are then coated with the resin which enters the gun through a separate line. The coated bubbles are then forced through the gun into wall cavities through small holes cut into the wall for that purpose. At first, the coated bubbles have the appearance and consistency of shaving cream, but the foam soon begins to harden or cure until it becomes firm and self supporting. Subject to conditions of temperature and humidity, the curing process is usually complete in a few days. The quality of the overall product depends on the quality of the ingredients, the correctness of the mixture, the age and viscosity of the resin, and the temperature at which the foaming occurs.

The disadvantage of UFFI is that it releases, or "off-gases," formaldehyde vapor. The quality, mixture, age, handling, temperature and method of installation of the product, as well as the use of vapor barriers and the physical characteristics of the house, are all factors contributing to the amount of formaldehyde that will be released, or off-gassed, into the house or outside environment. Although the trial judge did not find, he noted there was evidence before the commissioner to suggest that even properly installed UFFI is likely to emit formaldehyde. The potential danger of this formaldehyde "off-gassing" is a subject of much scientific debate and is at the heart of the present controversy.

2. *The prior adminstrative and judicial proceedings.* The Department of Public Health (department) began investigating the release of formaldehyde from UFFI in the summer of 1978. On February 22, 1979, the commissioner announced that the department would hold hearings in late March on a proposed ban of UFFI. Prior to the hearings, a number of the present plaintiffs objected to the procedure outlined in the commissioner's notice, and requested an adjudicatory hearing, or, in the alternative,

certain other procedural safeguards. These requests were denied. Hearings were held on March 29 and 30, 1979. On November 1, 1979, the commissioner, acting under the authority of G. L. c. 94B, §§ 1, 2 & 8, issued regulations effective November 14, 1979, which declared formaldehyde and UFFI to be toxic and hazardous substances, banned the sale of UFFI, and required its repurchase in certain circumstances. 105 Code Mass. Regs. 650.000-650.990 (1979). The commissioner also released a detailed summary of the evidence and findings and conclusions concerning formaldehyde and UFFI (commissioner's findings). On November 16, Aerolite SPE Corporation (Aerolite), C.P. Chemical Company, Inc. (C.P. Chemical), Borden, Inc. (Borden), and others commenced actions in the Superior Court in Suffolk County against the commissioner challenging the ban and repurchase regulations. The commissioner and some of the parties thereafter entered into a stipulation whereby the commissioner agreed to stay the effective date of the repurchase regulations while the industry agreed to forgo seeking a preliminary injunction against the ban regulations. On May 9, 1980, the Formaldehyde Institute (Institute) and others commenced an action. The commissioner had scheduled further hearings to consider the repurchase regulations. The hearings were held on December 19, 1979, and on August 1, 1980. Motions by the parties for adjudicatory hearings or other procedural devices were again denied. On November 6, 1980, the commissioner issued revised repurchase regulations. 105 Code Mass. Regs. 650.220(3) and 650.222 (1980). These regulations, effective November 20, 1980, created a procedure for repurchase commencing when the owner of a building allegedly insulated with UFFI requested repurchase. The class of persons entitled to request repurchase was more limited than the class created in the original repurchase regulations, and an informal referee review process was established to

determine, at the request of the affected industry member, whether the person requesting repurchase met the regulatory criteria.

Following issuance of these regulations, the plaintiffs in the actions by Borden and the Institute amended their complaints to challenge the revised repurchase regulations. Anderson Foam Distributors (Anderson) and a number of UFFI installers joined in a new action to challenge only the repurchase regulations. Only one of the plaintiffs in the Aerolite action, C.P. Chemical, renewed its claim against the repurchase regulations with an amended complaint.

The parties in the Borden action jointly moved that the case be specially assigned to a judge of the Superior Court to hear and decide all issues. The motion was allowed and on the commissioner's motion the case was consolidated with the three other cases challenging the regulations.

On July 31, 1981, the Berkshire Gas Company (Berkshire) commenced an action challenging the revised repurchase regulations and claiming as well that its involvement with UFFI did not fall within the reach of the regulations. This case was consolidated with the other four.[2]

[2]It is apparent that the Berkshire Gas Company did not manufacture or install UFFI. However, the trial judge found that it promoted the use of UFFI for its residential customers beginning in 1975. Initially, Berkshire referred customers to a specific private installer and received a referral fee. Approximately 122 houses were insulated under this arrangement. In late 1976 or early 1977, Berkshire ended the referral arrangement and began to negotiate and contract directly with its customers for installation. Berkshire then sub-contracted installation work to a private installer for a portion of the contract price with the customer, which was paid to Berkshire. Approximately 160 houses were insulated this way. About June, 1977, Berkshire terminated its arrangement with this

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The consolidated cases were heard over nineteen trial days in September and October, 1981. During trial, the judge excluded evidence offered by the commissioner concerning the potential carcinogenicity of formaldehyde.[3]

On January 18, 1982, the judge issued his findings, rulings and order (judge's findings), and, on January 29, 1982, he entered judgment invalidating the challenged regulations in their entirety. Relevant portions of the judges [sic] findings are discussed below. The judge denied the commissioner's motion to stay the judgment against the ban regulations, but he granted a temporary

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sub-contractor. It then began to purchase quantities of UFFI ingredients from Celsius Resources, Inc., and it maintained a supply of UFFI in its warehouse. Berkshire continued to promote use of UFFI among its customers and to negotiate and contract directly with them. Berkshire would sub-contract the actual installation with an installer approved by Celsius, and the installer would use Berkshire's supply of UFFI ingredients. Another 160 or so houses were insulated under this arrangement. Berkshire ceased contracting for installation of UFFI after March, 1979.

Berkshire asserts in its brief that it did not distribute, manufacture, or install UFFI but that it is nevertheless subject to the repurchase regulations. Although the judge made the above findings relative to Berkshire's promotional and contractual involvement with UFFI installation, he did not rule whether this activity fell within the ambit of the repurchase regulations. Because Berkshire does not argue here that it should not be subject to the repurchase regulations, we deem the issue waived. Mass. R. A. P. 16(a) (4), as amended, 367 Mass. 921 (1975). The commissioner does not challenge Berkshire's standing; therefore, we assume, without deciding, that Berkshire has standing to assert this appeal.

[3]The commissioner had stated in his findings that he did not rely on evidence of carcinogenicity in finding that UFFI was a hazardous substance but he had noted that carcinogenic evidence "provides an additional reason why formaldehyde and UFFI are toxic and hazardous and buttresses the findings concerning the danger posed by formaldehyde and UFFI."

stay to allow the commissioner to seek a stay pending appeal. The commissioner appealed from the judgment to the Appeals Court on February 3, 1982. The Appeals Court continued the stay as to the ban regulations until further order. That stay is presently in effect due to the collective suggestion filed in the Appeals Court by all parties, and treated by that court as a stipulation. This court subsequently allowed separate applications for direct appellate review. We reverse the judgments of the Superior Court.

3. *Right to an adjudicatory hearing.* The plaintiffs contend that as to the commissioner's decisions to ban UFFI and to compel the product's repurchase from consumers, they were entitled to an adjudicatory proceeding under the State Administrative Procedure Act (G. L. c. 30A), the Federal Hazardous Substances Act (15 U.S.C. §§ 1261–1274 [1976]), and the Federal and State Constitutions. See G. L. c. 30A, § 1 (1) (definition of adjudicatory proceeding). The trial judge so held. We disagree.

First, the plaintiffs argue that G. L. c. 94B required an adjudicatory hearing. They contend that as c. 94B, § 2, required the commissioner to promulgate regulations in conformity, in so far as practicable, with regulations established pursuant to the Federal Hazardous Substances Act, and as that Act arguably requires an adjudicatory hearing prior to the banning of a product, G. L. c. 94B likewise requires an adjudicatory hearing. We disagree.

General Laws c. 94B, § 2, as appearing in St. 1972, c. 506, § 1, provides in relevant part, "The commissioner shall cause the regulations promulgated under this chapter to conform, insofar as practicable, with the regulations established pursuant to the Federal Hazardous Substances Act." The statutory language

does not require conformity with Federal administrative procedure. We decline to read such a requirement into the plain language of G. L. c. 94B, § 2. We read the statutory language quoted above as ensuring that the Commonwealth's regulation of a particular substance be harmonious with any Federal regulation of the same product. In light of the State law of administrative procedure embodied in G. L. c. 30A, we do not read the above quoted language as reflecting a legislative intent to incorporate the Federal law of administrative procedure into the State regulation of hazardous substances.

The plaintiffs also argue that G. L. c. 30A required the commissioner to hold an adjudicatory hearing. They argue that the proceeding before the commissioner was a proceeding against a specific res, UFFI, and conclude that where that res had an obvious spokesman (The National Association of Urea-Formaldehyde Insulation Manufacturers, [NAUFIM]), such a proceeding should be conducted in accordance with the procedures governing adjudicatory proceedings. We disagree.

An administrative agency may act either by adjudications or by rule-making. "[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *Arthurs* v. *Board of Registration in Medicine*, Mass. Adv. Sh. (1981) 849, 863, quoting *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). General Laws c. 30A, § 1 (1), as amended by St. 1966, c. 497, defines an adjudicatory proceeding as "a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing." As we said in *Labor Relations Comm'n* v.

Fall River Educators' Ass'n, Mass. Adv. Sh. (1981) 297, 302, "[a]n adjudicatory proceeding is one in which a statutory or constitutional direction dictates an agency hearing." On the other hand, a regulation is defined as "the whole or any part of every rule, regulation, standard or other requirement of general application and future effect . . . adopted by an agency to implement . . . the law enforced or administered by it. . . ." G. L. c. 30A, § 1 (5), as amended through St. 1974, c. 361, § 1. The conceptual borders dividing adjudication and regulation have not yet been clearly drawn, and such a clear division may well be impossible of achievement.

However, a three-pronged analysis is appropriate in these cases. First, are the "legal rights, duties or privileges of specifically named persons" at issue? If so, does any provision of the General Laws require that such rights, duties, or privileges be determined after an agency hearing? If not, does any constitutional provision require that such rights, duties, or privileges be determined after an agency hearing? G. L. c. 30A, § 1 (1).

Resolution of the first question is dispositive of the issue with respect to the ban regulations. There are no "specifically named persons" whose rights, duties or privileges are being determined. In pursuit of the goal of protecting the public health and safety, the commissioner declared UFFI to be a banned hazardous substance and ordered its removal from commerce. G. L. c. 94B, § 2 (*d*). He did not purport to determine the legal rights, duties, or privileges of any named persons.[4] As such, the proceeding was not an adjudicatory proceeding within the meaning of G. L. c. 30A, § 1 (1).

[4]We do not view NAUFIM, the urea-formaldehyde trade association, as being a "specifically named person" whose interests were at issue.

However, as to the regulation ordering the repurchase of UFFI,[5] a hearing as required by the Federal and State Constitutions in those circumstances in which a consumer asks the commissioner to require a certain named supplier[6] to repurchase identified UFFI from such consumer. This type of proceeding will be one in which the legal rights and duties of specifically named persons are required by the Federal and State Constitutions to be resolved through an adversary procedure. Therefore, under the State Administrative Procedure Act and concepts of procedural due process, the commissioner must conduct an adjudicatory proceeding to determine whether a named supplier furnished the UFFI in question, and is, therefore, subject to an order compelling its repurchase.

The commissioner's repurchase regulations provide that, at the request of the supplier, the consumer and the supplier of the UFFI may submit written materials to the department. 105 Code Mass. Regs. 650.222 (E) (1)-(6) (1980). These materials will be forwarded to a medical referee and to a legal referee selected by the commissioner. *Id.* 650.222 (E) (7). The medical referee shall review the material and shall determine whether the consumer suffered adverse health symptoms after or during exposure to UFFI and whether such symptoms are characteristic of formaldehyde exposure. *Id.* 650.222 (E) (9) (a). Likewise, the legal referee shall review the materials and shall determine the following issues: whether the consumer owned a UFFI insulated build-

[5]Such a result is compelled by an analysis of the same factors explained above.

[6]For the sake of clarity, we shall use this term to include, where appropriate, the manufacturers, installers, dealers, and other distributors of UFFI who fall within the commissioner's regulations. We shall use the term "supply" to include, where appropriate, manufacture, install, deal, and distribute.

ing, *id.* 650.222(E)(9)(b)(1); whether the UFFI was installed in the building, *id.* 650.222(E)(9)(b)(2); whether the request for repurchase was timely filed, *id.* 650.222(E)(9)(b)(3); whether the person adversely affected by the UFFI is an occupant or former occupant of the UFFI insulated building, *id.* 650.222(E)(9)(b)(4); and whether the named supplier furnished the UFFI of which repurchase is requested, *id.* 650.222(E)(9)(b)(5). These findings shall be made "unless the [referees conclude] that the record clearly and convincingly demonstrates that [the findings] are untrue." *Id.* 650.222(E)(9)(a)&(b). Once these findings have been made, the commissioner shall issue a "Certificate of Right to Repurchase" entitling the consumer to a repurchase of the UFFI. *Id.* 650.222(E)(9)(c)&(F)(1).

We conclude that insofar as the regulations do not require the legal referee to conduct an adjudicatory hearing with respect to the issue of whether the named supplier in fact supplied the UFFI of which repurchase is sought, such regulations are deficient because in such a circumstance the rights, duties, and privileges of a "specifically named" person are required by due process principles to be determined after a trial-type hearing. *Id.* 650.222(E)(9)(b)(5). This factual issue is not a political question, but, rather, an adjudicative question which depends, for its resolution, upon the examination of specific facts relating to a particular supplier and consumer. Under these circumstances, procedural due process based on ordinary principles of fairness requires the agency to conduct an adjudicatory hearing on such issue. *Milligan* v. *Board of Registration in Pharmacy*, 348 Mass. 491, 499 (1965). With the qualification that an adjudicatory hearing is required to determine the factual issue as to who supplied the particular UFFI in question, we hold that the repurchase regulations are, with respect to the right to an adjudica-

tory hearing, constitutional and consistent with G. L. c. 30A, § 1 (1).

The reason that an adjudicatory hearing is required only with respect to the issue of what supplier furnished the UFFI of which repurchase is sought is based on a proper interpretation of G. L. c. 94B, § 8. Once a product is banned under c. 94B, § 2, such product "*shall*, in accordance with regulations of the commissioner, be repurchased . . . ." G. L. c. 94B, § 8. The only limitation which the Legislature placed on this mandatory requirement of repurchase is that no manufacturer, distributor, or dealer shall be required to repurchase any particular UFFI except "from the person to whom he sold it . . . ." G. L. c. 94B, § 8 (a)-(c). Pursuant to the authority delegated to the commissioner, the commissioner has the power to require that all UFFI be repurchased subject only to the proviso that no one shall be compelled to repurchase UFFI which it did not supply. This statutorily delegated power does not depend upon whether the consumer owned a UFFI insulated building, whether the UFFI was installed in the building, whether the request for repurchase was timely filed, whether the person adversely affected by the UFFI is an occupant or former occupant of the UFFI insulated building, whether an occupant or former occupant of a UFFI insulated building experienced adverse health symptoms, whether such symptoms occurred or were aggravated after exposure to UFFI as an occupant of a UFFI insulated building, whether such symptoms occurred while the occupant was present in a UFFI insulated building, or whether the occupant's symptoms are characteristic of exposure to formaldehyde. Thus, the commissioner's requirement that these eight issues be resolved through the referee procedure is purely gratuitous. Accordingly, the plaintiffs may not prevail on the contention that the commissioner was compelled to go further and require an

adjudicatory hearing with respect to these issues. See discussion *infra* at 729-732.

Two consequences flow from our decision that a limited adjudicatory hearing is required. First, this right to an adjudicatory hearing requires that the supplier from whom repurchase is sought has the right to examine and cross-examine witnesses on the issue whether the company actually supplied the UFFI. Second, this right by necessity implies the concomitant right, exercisable prior to the hearing, to inspect the UFFI so that the supplier may determine whether there is a viable factual dispute on that point.

4. *Review of commissioner's regulations.* (A) *The ban regulations.* Unless an exclusive mode of review is provided by law, judicial review of agency regulations is to be gained through a petition for declaratory relief. G. L. c. 30A, § 7. There being no exclusive mode provided in G. L. c. 94B or elsewhere, an action for declaratory relief under G. L. c. 231A is the appropriate procedure to challenge the commissioner's regulations. Because we think that the plaintiffs failed to prove that the commissioner lacked any conceivable, rational basis for the regulations, we reverse the judge's ruling that the ban regulations are invalid.[7]

[7]The commissioner urges that it was error for the trial judge to deny his motion for summary judgment which was based on his contention, as stated in his brief, "that the evidence compiled in the administrative hearings unquestionably demonstrated that there was not only a conceivable, but an actual, basis for the Commissioner's action."

In *Consolidated Cigar Corp.* v. *Department of Pub. Health*, 372 Mass. 844 (1977), we implicitly recognized that summary judgment may be appropriate in actions for declaratory relief "where litigation focuses on the power of an administrative agency to act as [it] did. . . ." *Id.* at 855. See *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456,

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We take this opportunity to set forth, once again, the guiding principles for judicial review of agency regulations. We begin by noting that an agency's power to make regulations is delegated by the Legislature. See *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 185-186 (1935); *Commonwealth* v. *Diaz*, 326 Mass. 525, 527 (1950). Acting upon this delegation, an agency may, unless specifically prohibited, properly base its regulatory decisions on the same kinds of "legislative facts" on which the Legislature could rely in its enactment of a statute. See 4 K.C. Davis, Administrative Law § 15.03 (1958). Cf. *Grocery Mfrs. of*

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464 n.8 (1981), and *Shell Oil Co.* v. *Revere*, Mass. Adv. Sh. (1981) 1285, 1291 n.11 (courts express no view whether summary judgment would have been appropriate in challenges to State law and municipal ordinance, respectively). See also *Commonwealth* v. *Leis*, 355 Mass. 189, 202 (1969) (Kirk, J., concurring). Cf. *Ciszewski* v. *Industrial Accident Bd.*, 367 Mass. 135, 139 (1975). Given the focus of the litigation here, however, we think the judge did not err in denying the motion. The plaintiffs do not challenge the power of the commissioner to ban hazardous products and to order repurchase. Rather, they contend that the commissioner had no rational, conceivable ground to ban UFFI on the basis of the current scientific information concerning its hazard and the dangers of formaldehyde. There was a material issue of fact, namely whether the state of scientific information concerning UFFI and formaldehyde was such that the commissioner would have been arbitrary or capricious in relying upon it. We note that both at trial and before this court the commissioner has preferred to rest his argument essentially on the soundness of his regulations as based on the scientific information available to him rather than on a hypothetical but rationally conceivable basis. Given this posture of the commissioner's case, and given also the nature and complexity of scientific evidence, we think the judge acted properly in allowing the plaintiffs to proceed. We do not imply, however, that once trial had begun the plaintiffs were relieved in any way of their burden of proving that the commissioner lacked any rational, conceivable basis. We also do not intend to vouchsafe any general statement as to the appropriateness of summary judgment in other challenges to legislative or administrative actions.

America, Inc. v. *Department of Pub. Health*, 379 Mass. 70, 79-80 (1979); *Cast Iron Soil Pipe Inst.* v. *State Examiners of Plumbers & Gas Fitters*, 8 Mass. App. Ct. 575, 586 (1979), and cases cited. A regulation is essentially an expression of public policy. See *Grocery Mfrs. of America, Inc.* v. *Department of Pub. Health*, *supra*. The issue on review is not whether the regulation was supported by substantial evidence in the record before the agency. *Massachusetts State Pharmaceutical Ass'n* v. *Rate Setting Comm'n*, 387 Mass. 122, 126 (1982). *Grocery Mfrs. of America, Inc.* v. *Department of Pub. Health*, *supra* at 80. *Greenleaf Fin. Co.* v. *Small Loans Regulatory Bd.*, 377 Mass. 282, 293 (1979). Indeed, "[f]acts represented in material submitted to an agency, unless stipulated as admitted, may not be relied on in a judicial challenge to an administrative regulation." *Grocery Mfrs. of America, Inc.* v. *Department of Pub. Health, supra* at 81. Rather, the person challenging the regulation is illegal, arbitrary, or capricious.[8] *American Family Life Assurance Co.* v. *Commissioner of Ins., ante* 468, 477-478 (1983). *Massachusetts State Pharmaceutical Ass'n* v. *Rate Setting Comm'n, supra*.

[8]The plaintiffs contend that the court's function is "to determine whether there is any rational basis upon which the regulation can be sustained." We agree. However, we do not agree with the plaintiffs' contentions that in making this determination the court must view the regulations in light of the factors and standards required or deemed relevant under the Federal Administrative Procedure Act. While some of these factors are helpful, others are neither necessary nor appropriate under this State's Administrative Procedure Act. Cf. *Grocery Mfrs. of America, Inc.* v. *Department of Pub. Health*, 379 Mass. 70, 80 (1979) (State agency need not make findings of legislative facts in the record of regulatory proceeding although Federal agency would be so required). The United States Supreme Court itself did not rely on these factors when it recently upheld the validity of State legislation banning the use of plastic, non-refillable milk containers. *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). Instead, the Court reviewed the

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Because the agency proceeding is not an adjudicatory one, cf. *Milligan* v. *Board of Registration in Pharmacy*, 348 Mass. 491 (1965), a plaintiff may not meet its burden "by arguing that the record does not affirmatively show facts which support the regulation." *Purity Supreme, Inc.* v. *Attorney Gen.*, 380 Mass. 762, 776 (1980). *Colella* v. *State Racing Comm'n*, 360 Mass. 152, 156 (1971). "If the question is fairly debatable, courts cannot substitute their judgment for that of the Legislature." *Druzik* v. *Board of Health of Haverhill*, 324 Mass. 129, 136 (1949). A plaintiff must prove "the absence of any conceivable ground upon which [the rule] may be upheld." *Purity Supreme, Inc.* v. *Attorney Gen., supra*[9], quoting *Druzik* v. *Board of Health of Haverhill, supra* at 138. This is so because a properly promulgated regulation has the force of law, *Purity Supreme, Inc.* v. *Attorney Gen., supra* at 768, and must be accorded all the deference due to a statute. *Massachusetts State Pharmaceutical Ass'n* v. *Rate Setting Comm'n, supra* at 127. "Thus, [a court] must apply all rational presumptions in favor of the validity of the administrative action and not declare it void unless its provisions cannot by any reasonable con-

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State's claims for justification of the law and noted that it must uphold the legislation "[i]f any one of the four [reasons] substantiates the State's claim." *Id.* at 465. Finding that "in view of the evidence before the legislature, the question clearly is 'at least debatable.' *United States* v. *Carolene Products Co.*, 304 U.S. [144], 154 [1938]," the Court reversed the Minnesota Supreme Court's decision invalidating the ban and held that that court had "erred in substituting its judgment for that of the legislature" even though it may have been correct that the ban was not a "sensible means" of achieving the conservation goals that the Legislature had in mind when it enacted the law. *Id.* at 469.

[9]This is consistent with the fact that an agency is not, barring a specific statutory mandate, obliged to provide a statement of the reasons which support its adoption of a regulation. *Massachusetts State Pharmaceutical Ass'n* v. *Rate Setting Comm'n*, 387 Mass. 122, 127 (1982).

struction be interpreted in harmony with the legislative mandate." *American Family Life Assurance Co.* v. *Commissioner of Ins., supra* at 477, quoting *Consolidated Cigar Corp.* v. *Department of Pub. Health*, 372 Mass. 844, 855 (1977). This deference is necessary to maintain the separation between the powers of the Legislature and administrative agencies and the powers of the judiciary. "A court may not substitute its judgment for that of the Legislature if the regulation comports with the power delegated." *Purity Supreme, Inc.* v. *Attorney Gen., supra* at 776. This deference also precludes the possibility that a plaintiff may frustrate administrative policy merely by amassing facts, statistics, and testimony before a judge, all of which may have little or nothing to do with the legislative facts which the administrative agency relied upon in making its regulation. "[R]espect for the legislative process means that it is not the province of the court to sit and weigh conflicting evidence supporting or opposing a legislative enactment." *Shell Oil Co.* v. *Revere*, Mass. Adv. Sh. (1981) 1285, 1290-1291. *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 594 (1939). Accord, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981). See *Sturges* v. *Chilmark*, 380 Mass. 246, 256-257 (1980); *Cambridge Elec. Light Co.* v. *Department of Pub. Utils.*, 363 Mass. 474, 491 (1973) ("[F]or the court to check back on the agency's 'reasons' and 'determination[s]' of fact and law would have an unhealthy tendency to substitute the court for the agency as policymaker").

We turn to the specific mandate here at issue. General Laws c. 94B, § 2 (*d*), as appearing in St. 1972, c. 506, § 1, provides that "[i]f the commissioner finds that an article subject to this chapter cannot be labeled adequately to protect the public health and safety, or the article presents an imminent danger to the public health and safety, he may declare the article to be a banned

hazardous substance and require its removal from commerce."[10] An article is subject to this chapter if it is a "hazardous substance" as defined in G. L. c. 94B, § 1,[11] or if the commissioner declares it to be a "hazardous substance" in accordance with G. L. c. 94B, § 2 (*a*).[12] There are no requirements in G. L. c. 94B that the commissioner conduct any specific tests or determine that any specific number of people are or will be affected by a particular substance in making his finding concerning it. Nor is there any indication that the commissioner must hold an adjudicatory hearing before making his finding. The commissioner may act only with respect to those substances concerning which he makes certain findings, but his power to make those findings is limited only in that he must not exercise it illegally, arbitrarily, or capriciously.

The judge found that "[f]ormaldehyde, . . . at some level of concentration, becomes an irritant. . . . [F]urther . . . as this abrasive level of exposure is increased, the exposure level becomes tox-

[10]There is no requirement in this section that the commissioner consider less drastic alternatives to a ban.

[11]General Laws c. 94B, § 1, as appearing in St. 1972, c. 506, § 1, defines "hazardous substance" in pertinent part as "any substance or mixture of substances which is toxic, corrosive, an irritant, a strong sensitizer, flammable or which generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use . . . ."

The terms "toxic" and "irritant" are further defined elsewhere in § 1.

[12]General Laws c. 94B, § 2(*a*), inserted by St. 1960, c. 727, § 2, provides, "Whenever in the judgment of the commissioner such action will promote the objectives of this chapter by avoiding or resolving uncertainty as to its application, the commissioner may by reasonable rules and regulations declare to be a hazardous substance, for the purpose of this chapter, any substance or mixture of substances which he finds meets the requirements of the same term as defined in section one."

ic." We accept this finding. Since formaldehyde meets the definition of hazardous substance, we conclude that formaldehyde is properly regulated under G. L. c. 94B. The crux of the issue before us, then, is—as it was before the judge—whether the presence of formaldehyde in UFFI justifies the ban of the latter product. The ban would be justified if the commissioner could rationally find that UFFI could not "be labeled adequately to protect the public health and safety, or [that UFFI] present[ed] an imminent danger to the public health and safety." G. L. c. 94B, § 2 (*d*).

We have in the past sustained regulations on the ground that there was a conceivable basis for the agency decision. *Colella* v. *State Racing Comm'n*, 360 Mass. 152, 157 (1971). See also *Shell Oil Co.* v. *Revere*, Mass. Adv. Sh. (1981) 1285, 1292 (upholding municipal ordinance banning self-service gas stations on basis of purposes which city could have had in mind). In this case, we need not go so far.[13] We have examined relevant portions of the trial transcript, and we conclude that there was evidence presented there which warranted the commissioner's action.

We briefly summarize portions of that evidence. At trial, Dr. Richard Gammage, a chemist, testified that tests conducted at the Oak Ridge National Laboratory on panels of wood foamed internally with UFFI and maintained under conditions which would approximate those of a corner room in a normal

[13]"We note that we are, of course, free to consider the evidence before the Commissioner, as well as any other relevant information, including that provided in the briefs in determining whether there was a rational basis for the Commissioner's regulations." *American Family Life Assurance Co.* v. *Commissioner of Ins.*, *ante* 468, 478 n.6 (1983).

house[14] indicated that UFFI emitted formaldehyde into the "room" in levels of concentration which ranged from .03 to about .25 or .3 parts per million. There was also testimony from Dr. George Allen, a professor of fiber and polymer science at the University of Washington, called by the plaintiffs, that a greater amount of formaldehyde is released from UFFI with increases in heat and humidity. The judge found that improper mixing or installation of UFFI could increase the rate of formaldehyde emission. Dr. Murray Cohn, a biochemist at the Consumer Product Safety Commission (CPSC),[15] testified that he conducted statistical tests to compare the average level of formaldehyde in houses that were insulated with UFFI with the average level found in houses not insulated with UFFI. His results indicated that the average level in houses insulated with UFFI was .12 parts per million whereas the average level in noninsulated houses was .03 parts per million.[16] He further testified that he found there was a ninety-eight percent probability that the difference in levels was real and not due to error in the statistical analysis. A report entitled "Formaldyde—An Assessment of Its Health Effects" prepared by the National Academy of Sciences and entered as evidence at trial stated that: "[T]he studies of public exposure to

[14]Dr. Gammage qualified this statement on cross-examination by testifying that if the house did not have the same type of construction as the test panels, it would not be appropriate to directly transpose the date to the house. He also testified that variables not taken into account in the tests could affect the utility of the test data in certain situations.

[15]Dr. Cohn testified in a private capacity and not as a representative of the CPSC.

[16]The judge noted that studies conducted by the department on 198 houses in Massachusetts whose occupants complained of various symptoms which occurred after installation of UFFI indicated that in twenty-one per cent of the houses no level of formaldehyde was found, in seventy-eight per cent of the houses the level was found to be .09 parts per million or less, and in all houses the level was less than .5 parts per million.

formaldehyde in indoor aid suggest a wide range of sensitivity, with effects reported at 0.01-31.7 [parts per million]." Dr. Andrew Ulsamer, Director of the Division of Health Effects at the CPSC,[17] testified that his opinion, based on his review of the National Academy of Sciences report, was that "there are health effects of formaldehyde at relatively low levels, and if one considers the various sensitive populations that may be involved, that there may indeed not be a population threshold at any measurable level of formaldehyde within the general population."[18] He further testified that persons who suffer from asthma, chronic obstructive pulmonary diseases such as emphysema or chronic bronchitis, and persons who are allergic to formaldehyde, would suffer health effects at exposure to levels less than .1 parts per million. He estimated these groups to compose about ten per cent of the population. Finally, he testified that all the symptoms, except ear irritation, that had been listed by the commissioner in his repurchase regulations as characteristic of exposure to formaldehyde were in fact characteristic of such exposure. The judge found that these symptoms were characteristic of exposure to formaldehyde and many other common causes as well. Thus, there was evidence before the judge indicating that UFFI would potentially in some conditions emit formaldehyde into houses at levels above which at least a significant portion of the population would experience adverse health effects.[19]

[17]Dr. Ulsamer testified solely in a private capacity.

[18]In his findings, the judge noted that a study conducted by a Dr. Alarie and relied on by the commissioner indicated, based on the doctor's extrapolations from animal research, that humans should be exposed to no more than .03 parts per million of formaldehyde in the indoor environment with a preferred level of .003 parts per million.

[19]The judge made a number of findings concerning these issues: "At the present state of the technical knowledge and expertise, there has

(footnote continued on next page)

In light of this evidence, we cannot say that the commissioner acted arbitrarily or capriciously in banning UFFI.

(footnote continued from preceding page)
been no showing that the ambient level of formaldehyde concentration in houses in which UFFI has been properly installed is significantly more appreciable or different than the level of formaldehyde in similar houses without UFFI. . . . Simply stated, I find as a fact that the present data bank on the toxicology of formaldehyde is too deficient to permit the fixing of exact toxicological standards for formaldehyde exposure based upon reasonable scientific certitude for either the many various industrial or residential environments. I find further that there is in fact a population threshold for the irritant effects of exposure to formaldehyde in houses. Moreover, from the toxicological evidence produced at trial, I find and conclude factually that residential exposure to formaldehyde at levels below 0.1 parts per million is an exposure beneath this undetermined population threshold. I further conclude, insofar as it is a question of fact, that from the data made available to the Commissioner and presently found within its administrative record there is no evidence upon which an agency fact finder would be warranted in concluding that the population threshold for irritant or toxic effects of exposure to formaldehyde is zero. . . .

"Therefore from the epidemiological evidence produced at the trial, insofar as the same is a question of fact, I find there has been no showing that the symptoms focused upon are more prevalent among individuals living in UFFI houses than any other group of residents."

The commissioner disputes the judge's interpretation of the evidence upon which he relied in making some of these findings. We need not enter the fray. However, we do note that these findings relate to facts demonstrable at the time of trial. As such, they do not refute that aspect of the commissioner's evidence at trial which indicated that UFFI potentially will release formaldehyde into buildings at levels greater than .1 parts per million. We think this evidence supports a rational determination that UFFI "presents an imminent danger to the public health and safety." G. L. c. 94B, § 2 (*d*). Certainly the commissioner need not wait until the danger materializes before taking action. See *Shell Oil Co.* v. *Revere*, Mass. Adv. Sh. (1981) 1285, 1292 (upholding ban of self-service gas stations "[w]hether the ordinance was a response to actual instances of customer misuse or an attempt to forestall such prob-

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That the commissioner was unable to determine the amount of formaldehyde that UFFI contributed to the indoor environment, that he did not know how many people in the Commonwealth had been affected by UFFI, that he had not compared the levels of formaldehyde in UFFI and non-UFFI houses, that he had not caused epidemiological studies to be made to determine the incidence of symptoms allegedly caused by UFFI, that experts called by the plaintiff at trial offered evidence contrary to the commissioner's, and that the commissioner's experts significantly qualified their testimony on cross-examination[20] does not obviate

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lems . . . "). The commissioner has a statutory responsibility to "take cognizance of the interests of life, health, comfort and convenience among the citizens of the commonwealth." G. L. c. 111, § 5. Some doubts whether UFFI properly installed in houses will cause the symptoms characteristic of exposure to formaldehyde need not stay the commissioner's hand. Cf. *Commonwealth* v. *Leis*, 355 Mass. 189, 195 (1969) ("We do not think that the present unavailability of or inability to collect absolute, statistical and scientific proof that the smoking of marihuana (1) triggers 'psychotic breaks,' (2) leads to the use of more dangerous drugs and (3) causes automobile accidents prevents the Legislature from acting to prohibit its use"). Indeed, the commissioner might well have acted irresponsibly had he ignored the mounting evidence of the dangers of formaldehyde exposure. Cf. *Washington State Farm Bureau* v. *Marshall*, 625 F.2d 296, 306 (9th Cir. 1980), where the court stated that, "[g]iven [the Secretary's] clear statutory mandate to protect the children, it would have been reasonable—if not imperative—for him to prefer the advice of the more cautious expert opinions, which were based on an independent review of available data." The case involved the Secretary of Labor's regulatory ban of the use of certain pesticides. We note also that the Consumer Product Safety Commission has recently banned the use of UFFI in houses and schools. 47 Fed. Reg. 14,366 (1982) (to be codified at 16 C.F.R., part 1306).

[20]We can conceive of circumstances where scientific evidence could be so severely impeached as to render any reliance upon it unreasonable. This is not the case here, especially given the inherently tentative nature of most scientific inquiry.

the fact that he had a rational and certainly conceivable basis for his decision.[21]

(B) *The repurchase regulations.* The plaintiffs contend that the commissioner's repurchase regulations are arbitrary and capricious because they fail to afford fundamental procedural safeguards. They do not contend that these regulations result in a taking of property in violation of their substantive due process rights. We have earlier stated that those suppliers of UFFI who are asked to repurchase the product are entitled to an adjudicatory hearing to determine whether the particular UFFI complained of was sold by them. In this section, we deal with the plaintiffs' other objections. The plaintiffs claim that the regulations are invalid because they prohibit the plaintiffs from showing the amount, source or relative level of any ambient formaldehyde

[21]We find no relevance in the fact, if it is one, that, in the judge's words, the commissioner shifted "the burden away from the proponents of the ban and deposit[ed] it upon the industry without notice at the time of the hearing." The judge made this conclusion on the basis of statements in the commissioner's findings of which the following is an example:

"Opponents have claimed that proper installation will eliminate formaldehyde . . . (but) . . . have not substantiated these claims with scientific tests or other evidence . . . (nor) . . . demonstrated UFFI can be properly installed. . . . Nor do I have evidence showing what installation procedure will control vapor problems or whether these procedures will eliminate vapor emissions from the insulation. I therefore cannot conclude that improper installation necessarily accounts for the formaldehyde problems experienced in UFFI."

While the commissioner's implicit placement of the burden on the industry may have consequences in the context of the adjudicatory hearing which the judge believed was required, the question of "burden" has no meaning in the context of a regulatory hearing. The mere fact that the commissioner couched his findings in language which would indicate that the industry had a burden of proof would not affect the appropriateness of his actions if, in fact, there existed a reasonable, conceivable basis to support them.

in a house, or that no occupant of the house suffered UFFI related symptoms. These objections are more properly directed toward the statute from which the commissioner draws his power to issue the regulations. Once a substance has been banned as a hazardous substance under G. L. c. 94B, the supplier of the substance has the absolute obligation under G. L. c. 94B, § 8 to repurchase his product in accordance with regulations promulgated by the commissioner. The only questions that need be answered to establish this obligation are whether the product is a banned hazardous substance and whether the person from whom repurchase is sought was the supplier of the product. The fact that the product is banned forecloses the issue of causation in so far as repurchase is concerned.

In the present cases, the commissioner's regulations specify that the owner of a building insulated with UFFI is not entitled to a "Certificate of Right to Repurchase" if the alleged supplier requests review unless a medical referee determines that an occupant or former occupant did suffer adverse health symptoms characteristic of formaldehyde exposure while in a building insulated with UFFI, 105 Code Mass. Regs. 650.222(E)(9)(a) (1980), and unless a legal referee determines that the person requesting repurchase is the owner of a building insulated with UFFI which was supplied by the party from whom repurchase is requested. *Id.* at 650.222(E)(9)(b). The person seeking repurchase must submit certain specific information showing that he has met the prerequisites for repurchase and naming the supplier from whom repurchase is sought. The supplier may submit evidence tending to show that these prerequisites were not met, and the person seeking repurchase may submit rebuttal evidence. *Id.* at 650.222(E)(4), (5) & (6). Unless the record "clearly and convincingly demonstrates" that the prerequisites are not met, the per-

son seeking repurchase shall be entitled to a "Certificate of Right to Repurchase." *Id.* at 650.222(E)(9)(a), (b) & (c). The regulations thus limit the right of repurchase, when it is challenged, to those persons who are found to be entitled by this process. In this sense, the regulations define only the rights of the persons seeking repurchase, and the plaintiffs have no standing to challenge the manner in which these rights are determined. Their obligation to repurchase is defined by statute. The fact that the suppliers bear the burden of proof in the proceedings before the referees does not change the character of those proceedings into one which determines the rights, obligations, or duties of the suppliers.

The plaintiffs further contend that G. L. c. 94B, § 8, prevents the commissioner from requiring a supplier to repurchase other than from the person to whom the supplier sold the UFFI and that the regulations which would allow the owner to seek repurchase directly from anyone in the chain of manufacture, dealership, or installation are, therefore, invalid. We do not read that section, or the power delegated to the commissioner under it, so narrowly. Rather than a limitation as to who may be required to repurchase, this section is intended to establish the obligation of those in the chain of supply to repurchase such that the final obligation falls upon the manufacturer (or importer) who brought the product into the marketplace. The fact that a supplier lower in the chain was not required to repurchase does not negate the obligation of a supplier higher in the chain to do so when properly requested. In any event, a supplier who is required to repurchase may, in turn, require repurchase from the person who sold the product to it.[22]

[22]Each supplier in the chain may pass along, as part of the repurchase price, its "reasonable and necessary" expenses or charges connected

(footnote continued on next page)

The final challenge raised by the plaintiffs is that G. L. c. 94B, § 8, limits the cost of repurchase to a refund of the purchase price paid by the consumer. The argument is that since repurchase of UFFI as defined in the regulations would require its removal from the buildings at a cost far in excess of the actual purchase price[23], the regulations are invalid. However, it is clear from G. L. c. 94B, § 8(*a*)-(*c*), that the Legislature intended to require reimbursement for "reasonable and necessary" expenses and charges in connection with returning the product to the manufacturer along the chain of supply. We have already stated that the commissioner, by regulation, may cause the chain to begin at some point other than the supplier who finally sells the product to the consumer. We think that the costs specified in the regulations are reasonably and necessarily connected with return of the product along the chain of supply and that the commissioner had the power to structure the regulations so as to pass these costs directly to the appropriate supplier.

5. *Inclusion of tripolymer in ban.* The plaintiff C.P. Chemical argues that the commissioner acted arbitrarily and capriciously in that he included its product, tripolymer, within the ban of UFFI. The gravamen of this argument is that a chemical called phenol is incorporated into the structure of tripolymer and that this

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with returning the product. G. L. c. 94B, § 8 (a)-(c). Because the commissioner's regulations would allow the number of suppliers who must handle the product before it reaches the top of the chain to be minimized, the regulation will, as a practical matter, probably result in a significant saving to the manufacturer (or importer) who must ultimately bear the final costs of repurchase.

[23]There was testimony at trial that the average cost to remove UFFI from an average seven room house in Massachusetts in the manner specified in the regulations would be as high as $25,000. The judge found that the average cost would be between $12,000 and $14,000.

chemical alters the chemistry of tripolymer to such an extent that it cannot be classified as a UFFI. Moreover, C.P. Chemical claims that the incorporation of this chemical into tripolymer results in an extremely limited potential for formaldehyde emission. We reject C.P. Chemical's arguments.

On November 1, 1979, the commissioner issued regulations which banned UFFI. As we stated above, these regulations are not arbitrary or capricious. In December, 1980, C.P. Chemical wrote to the commissioner stating the tripolymer was not a urea-formaldehyde foam insulation as defined in the regulations. The commissioner had determined that tripolymer was a UFFI product and was subject to the ban against all UFFI products and so notified C.P. Chemical. After trial in the Superior Court, the judge found that tripolymer was a UFFI product. He concluded that the introduction of the chemical, phenol, into the structure did not so alter the structure as to take it out of the UFFI family.

The question whether or not tripolymer is a UFFI product is not an issue to be determined ab initio by the court. Rather, the question before us is whether there is any rational basis for the commissioner's conclusion that tripolymer is a UFFI product. We conclude that there is a rational basis for the commissioner's decision.

The commissioner viewed the term urea-formaldehyde foam insulation as a generic term encompassing all foam insulation substances containing formaldehyde. The commissioner determined that tripolymer fell within the generic category of formaldehyde insulation products. This determination is supported by the affidavit testimony of an officer of C.P. Chemical who stated that tripolymer is within the generic category of UFFI products.[24]

[24]This affidavit was read in evidence at trial.

Moreover, C.P. Chemical's complaint alleges that it manufactured products used in the manufacture of formaldehyde-based insulation. At trial the same officer of C.P. Chemical testified that tripolymer contained formaldehyde. Further, she testified that the finished tripolymer product released formaldehyde into the air. Additionally, an expert retained by C.P. Chemical admitted at trial that tripolymer contained formaldehyde, and that such formaldehyde could be released into the air. Another of C.P. Chemical's witnesses testified at trial that tripolymer could potentially release formaldehyde into the air. There was sufficient evidence on which the judge could find that the commissioner was not arbitrary or capricious in concluding that tripolymer is a UFFI product. This ends our inquiry.

As to C.P. Chemical's argument that tripolymer emits such a small amount of formaldehyde into the air that the commissioner's banning it is arbitrary and capricious, we refer to our discussion *supra* at 725-729, rejecting the same argument with respect to UFFI in general. Some doubts as to whether tripolymer will cause adverse health effects to consumers need not prevent the commissioner from acting to protect the public. Cf. *Commonwealth* v. *Leis*, 355 Mass. 189, 195 (1969) (lack of absolute scientific proof does not prevent regulatory action). The commissioner did not act arbitrarily or capriciously.

6. *Prejudgment of case.* The judge concluded that the commissioner had prejudged the case against UFFI. We hold that this conclusion is erroneous.

As we hold today, the proceedings before the commissioner in the cases before us were regulatory and not adjudicatory. One of the consequences which flow [sic] from this conclusion is that there is no constitutional, statutory, or common law requirement that

the regulatory body commence its inquiry with a tabula rasa. The nature of the rule-making process is such that one may reasonably contemplate that the regulatory body will, either on the basis of some external or internal impetus, determine that a potential problem exists and that further investigation is warranted to determine whether (1) such a problem does, in fact, exist and (2) some regulation is necessary to resolve the problem. *Cambridge Elec. Light Co.* v. *Department of Pub. Utils.*, 363 Mass. 474, 486-487 (1973).

The rule-making process is not an adversary process in which two or more competing parties phrase specific factual and legal issues for resolution by a decision maker. See 1 K.C. Davis, Administrative Law § 7.02 (1958) (discussing requirement of a trial to resolve disputed factual issues). Rather, the system is designed to inform a decision maker so as to allow him to render a decision on the basis of his expertise and on the basis of the information collected. *Cambridge Elec. Light Co.* v. *Department of Pub. Utils.*, *supra* at 486-487. While the adversary process, being adjudicatory in nature, necessitates the impartiality of the decision maker, the rule-making process, being legislative in nature, does not compel an absolutely indifferent decision maker. If the plaintiffs' argument were to prevail in this setting, the result would be to halt the rule-making process because regulatory bodies would not commence investigations where the very decision to investigate would be fatal to any regulation promulgated pursuant to such an investigation.

Indeed, the Legislature has granted the commissioner specific authority to disseminate information to the public concerning hazardous substances when he believes there is a possible public health problem. G. L. c. 94B, § 9(*b*). Moreover, under the State Administrative Procedure Act, the commissioner is required to

give public notice which refers to the statutory authority under which the action is proposed and "either state[s] the express terms or describe[s] the substance of the proposed regulation. . . ." G. L. c. 30A, § 2, as appearing in St. 1976, c. 459, § 2. The purpose of this notice is to allow interested parties to provide information to the commissioner.

In the cases before us the commissioner gave notice which described the problem and stated that public hearings would be held to examine the potential health effects of UFFI. We cannot conclude that the commissioner's adherence to the enabling statute and to the State Administrative Procedure Act constituted a prejudgment of the case against UFFI.

The result we reach today on this issue is consistent with our characterization of th rule-making process in *Cambridge Elec. Light Co.* v. *Department of Pub. Utils.*, 363 Mass. 474 (1973). In that case we said "[p]resumably the department already had an understanding of the billing, termination, and related practices of the gas and electric companies and also an idea of the customer problems related to those practices. The department was in search of current information and arguments as to industry wide experience to supplement and test its own knowledge and to help it shape a workable set of regulations if that was needed." *Id.* at 486-487. The same description adheres to the commissioner's action in the cases before us. The mere fact that the commissioner had some knowledge of the subject and decided to test such knowledge by conducting an investigation does not invalidate the regulations issued pursuant thereto. Therefore, we set aside the judge's conclusion that the case against UFFI was prejudged.

7. *Evidence of UFFI's carcinogenicity.* Our disposition of these cases renders it unnecessary to examine the admissibility of

evidence concerning UFFI's potential carcinogenicity. However, because the significance of this issue transcends the instant cases, we shall address it.

The judge excluded evidence offered by the commissioner which tended to show that UFFI's emission of formaldehyde, even in low concentrations, could cause cancer in humans. The judge stated that he excluded the evidence because the commissioner disclaimed reliance upon it.[25] Given the posture of the cases, the judge should have admitted the evidence.

As we have stated above, a regulation promulgated by an administrative agency will be upheld unless the opponents prove at trial that there is no rational basis for the regulation. A court is not concerned with whether there was substantial evidence in a record before the agency, but rather it must determine whether the record made in court discloses that the adoption of the agency regulation was illegal, arbitrary, or capricious. *Massachusetts State Pharmaceutical Ass'n* v. *Rate Setting Comm'n*, 387 Mass. 122, 126 (1982). Accordingly, the commissioner's statement that he did not necessarily rely upon the evidence of UFFI's carcinogenicity for his decision to ban the substance does not preclude him from offering such evidence at trial to prove that there is a rational basis for his regulation. Moreover, although the commissioner is not compelled to establish affirmatively at trial that there is a rational basis for his regulation,[26] there is nothing in our previous cases to preclude him from doing so or to preclude him from introducing evidence before the judge on which he did not

[25]See note 3, *supra*.

[26]Cf. *Purity Supreme, Inc.* v. *Attorney Gen.*, 380 Mass. 762, 776 (1980) (opponent may not sustain burden of proof by arguing that record does not affirmatively show facts supporting regulation); *Colella* v. *State Racing Comm'n*, 360 Mass. 152, 156 (1971) (same).

specifically rely at the administrative level.[27] Thus, we conclude that the judge should have admitted the evidence.

8. *Federal preemption.* The judge concluded that "there is no basis for the contention that federal law has preempted the field plowed by Chapter 94B." Of the plaintiffs in the cases before us, only one, C.P. Chemical, had alleged that the Federal law preempted the field. We note that C.P. Chemical has not briefed the issue of Federal preemption in this court. Therefore, we need not address the issue. Mass. R. A. P. 16(a)(4), as amended, 367 Mass. 921 (1975).

9. *Other arguments.* C.P. Chemical argues that the retroactive application of the repurchase regulations violates the due process clause and the contract clause of the United States Constitution. Examining the two constitutional issues together, *American Mfrs. Mut. Ins. Co.* v. *Commissioner of Ins.*, 374 Mass. 181, 190 (1978), we reject the argument. An examination of the factors delineated in the *American Mfrs.* case compels the conclusion that the retroactive operation of the repurchase regulations is reasonable. See *id.* at 191. Cf. *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 29 (1977) (retroactive legislation disrupting contracts must be reasonable and necessary to serve important State interests). The public interest in eliminating the health hazard posed by the presence of UFFI in houses overrides the interests of the suppliers of UFFI in the integrity of a contract. We cannot say that the commissioner was unreasonable in concluding that repurchase was the most effective remedy available.

[27]See *American Family Life Assurance Co.* v. *Commissioner of Ins.*, *ante* 468, 478 n.6 (1983) (court may consider evidence before commissioner, as well as any other relevant information, in reviewing regulations).

Likewise, we are not persuaded by C.P. Chemical's argument that the ban and repurchase regulations are unconstitutionally vague because they do not contain a definition of UFFI. See generally *Druzik* v. *Board of Health of Haverhill*, 324 Mass. 129, 134 (1949) (penal regulation must be clearly expressed so as to give guidance to those purportedly subjected to it). The commissioner declared "urea-formaldehyde foamed-in-place insulation" to be a banned hazardous substance and ordered it to be removed from commerce. 105 Code Mass. Regs. 650.020 (1979). The commissioner was not constitutionally required to incorporate the chemical definition of urea-formaldehyde foamed-in-place insulation into his regulations—the absence of such a definition does not render the regulations vague.

10. *Conclusion.* We conclude that the judge erred in holding that the commissioner's ban and repurchase regulations were illegal, arbitrary, and capricious. Accordingly, we reverse the judgments of the Superior Court and remand the case with directions to grant declaratory relief consistent with this decision.

So ordered.

APPENDIX B

Order of the Supreme Judicial Court of Massachusetts Denying Petition for Rehearing

Supreme Judicial Court For The Commonwealth
ROOM 1412 COURT HOUSE
BOSTON, MASSACHUSETTS 02108
(617) 725-8055

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Clerk

FREDERICK J. QUINLAN
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June 1, 1983

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Gentlemen:

Re *Borden, Inc.* vs. *Commissioner of Public Health*
Supreme Judicial Court No. 2849

Your Petition for Rehearing in the above-captioned case has been considered by the Court and is denied.

Very truly yours,

/s/ PATRICK J. HURLEY
Clerk

PJH/pc

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APPENDIX C

Findings, Rulings and Order of the Superior Court

C1

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
Nos. 38,508-38,473
41840, 49725, 46647

BORDEN, ET ALS

VS.

COMMISSIONER OF PUBLIC HEALTH

FINDINGS, RULINGS & ORDER
STATEMENT OF THE CASE

These cases were previously consolidated and were the subject of a protracted trial. Each case involves the common issue, i.e. the validity of certain regulations promulgated by the Commissioner of Public Health. The first set of regulations is entitled "Regulations Concerning Hazardous Substances" and was issued on November 14, 1979. The second set is entitled "Regulations Concerning Repurchase of Banned Hazardous Substances" and that set of regulations was issued on November 20, 1980.

Briefly stated, the Commissioner bans all residential future sales of urea formaldehyde foamed-in-place insulation (hereinafter UFFI); and creates an administrative procedure whereby homeowners who have suffered any of certain symptoms may secure an order from the Department of Public Health requiring the installer, distributor, or manufacturer to remove it, refund the purchase price and restore the home. The cost of removal and restoration is very significant.

In Suffolk numbers 38508 and 38473, Borden and C.P. Chemical, two manufacturers, many contentions are made. First, regulation invalidity because of failure to afford an adjudicatory hearing. This contention is grounded in statutory construction as well as constitutional principles. Second, if the plaintiffs were not

entitled to a prior adjudicatory hearing, then, as a matter of right, they are entitled to a judicial review—not limited to any agency record. In this argument they are joined by the Formaldehyde Institute in Suffolk 41840.

The focus of Berkshire Gas (49725) as well as the Anderson case (46647) is solely upon the repurchase regulations and upon the significant liabilities that they will sustain if those regulations are upheld. However, these plaintiffs share with the manufacturers, at least as to repurchase, the contention that an adjudicatory hearing prior to the regulation is required and they also share the contention of constitutional due process deprivation. All and each of the plaintiffs have advanced numerous other contentions.

Discussion

Certain initial observations seem appropriate. Because of the factual complexity, the findings of fact have been divided under particular headings to permit an easier understanding by the parties and examination by an appellate reviewer. With respect to the rulings of law I have attempted to avoid any extended discussion but this was not always possible.

FINDINGS OF FACT

I

PARTIES

* * *

II

THE NATURE AND PRESENCE OF FORMALDEHYDE

Formaldehyde, a colorless, gaseous compound of carbon, hydrogen and oxygen (HCHO), is omni-present. It is found in the atmosphere, where it is continuously introduced through a variety of natural processes..

Therefore, in any environment, there are ambient concentrations of formaldehydes and other aldehydes (formaldehyde is the dominant aldehyde usually consisting of between a third and three-fourths of the aggregate present) and these concentrations depend on both their rates of formation and the subsequent removal reactions that occur. Obviously, urban atmosphere concentrations are generally appreciably greater than rural areas. These concentrations are usually measured on a part per million parts of ambient air basis. In most in-door environments, twenty-four hour average formaldehyde concentrations of 0.05 to 0.2 per million parts are not uncommon today. With respect to the atmosphere, formaldehyde has been measured at levels ranging from .005 to .008 in rural ambient air, to levels ranging up to .2 parts per million in urban outdoor air.

III

THE NATURE OF AND PRESENT COMMERCIAL SIGNIFICANCE OF UREA FORMALDEHYDE RESIN

* * *

IV

THE NATURE OF UFFI AND OTHER FINDINGS CONCERNING THIS INSULATION

* * *

V

FINDINGS CONCERNING TWO PARTICULAR UFFI PRODUCTS, INSULSPRAY AND TRIPOLYMER

Two particular foam insulations were the subject of evidentiary focus in the present proceedings. This was not the case at the time of the Administrative Hearings which preceded the ban.

* * *

The administrative hearings did not consider any specific product, but rather treated all the foam products generically; alluding generally to the "Chemical Composition of UFFI" on pages 5 and 6 of the Commissioner's finding, and declaring a banned hazardous substance "Urea-formaldehyde foamed in place insulation" without ever attempting to define it. See 105 CMR 650.020.

From the evidence produced at trial, I find, insofar as it is a question of fact, that Tripolymer insulation, if subjected to proper regulations has the capacity to be installed so as to eliminate or cure any vapor problem that has been experienced in Massachusetts. I further find, by a fair preponderance of that evidence that regulations regarding quality product control, licensure, and standards for installation may be reasonably fashioned which would permit a urea formaldehyde of the Insulspray type to be safely used.

VI

MEASUREMENT OF FORMALDEHYDE AND WITHIN UFFI HOMES

* * *

There were no tests of formaldehyde level [sic] made by the Department in any non UFFI homes. Additionally, there were no tests made by the Department to determine any representative or random outdoor ambient levels. Therefore, no comparison between UFFI and non UFFI houses has ever been had . . . .

* * *

Although the Department never undertook such a study, there has been research without the Commonwealth. A University of Iowa Group measured 31 randomly chosen non UFFI homes with

the chromotropic acid test and found an average level of .06 formaldehyde per million parts as against an average level of .05 formaldehyde per million parts for 116 randomly chosen UFFI houses. At the present state of the technical knowledge and expertise, there has been no showing that the ambient level of formaldehyde concentration in houses in which UFFI has been properly installed is significantly more appreciable or different than the level of formaldehyde in similar houses without UFFI.

VII

FINDINGS REGARDING HEALTH EFFECTS OF EXPOSURE TO FORMALDEHYDE AND PRESENT SCIENTIFIC INABILITY TO DRAW TOXICITY STANDARDS WITH REASONABLE SCIENTIFIC CERTITUDE

* * *

Simply stated, I find as a fact that the present data bank on the toxicology of formaldehyde is too deficient to permit the fixing of exact toxicological standards for formaldehyde exposure based upon reasonable scientific certitude for either the many various industrial or residential environments. I find further that there is in fact a population threshold for the irritant effects of exposure to formaldehyde in homes. Moreover, from the toxicological evidence produced at trial, I find and conclude factually that residential exposure to formaldehyde at levels below 0.1 parts per million is an exposure beneath this undetermined population threshold. I further conclude, insofar as it is a question of fact, that from the data made available to the Commissioner and presently found within its administrative record there is no evidence upon which an agency fact finder would be warranted in concluding that the population threshold for irritant or toxic effects of exposure to formaldehyde is zero.

* * *

The Commissioner could have caused an epidemiological study to have been had with the information that he possessed, but he elected not to compare the alleged health effects experienced by UFFI residents with the incidence rates for the general public. He did not rely upon any epidemiological evidence whatsoever. Indeed, not only did he not compare any such rates with incident rates in the general population, he simply did not know the incident rates within the UFFI group. He also was without any knowledge as to how many people experienced or with what frequency they experienced adverse health effects as a result of UFFI emitted formaldehyde. . . . However, the Commissioner did introduce an epidemiological study conducted by the New Jersey State Health Department. . . . This study compared symptoms experienced by members of households living in 400 homes insulated with UFFI with symptoms experienced by members of households living in 400 control homes without UFFI. . . . Interestingly, the prevalence data obtained by the New Jersey State Health Department show a greater overall frequency of health complaints in the control population than in the UFFI population.

Therefore from the epidemiological evidence produced at the trial, insofar as the same is a question of fact, I find there has been no showing that the symptoms focused upon are more prevalent among individuals living in UFFI houses than any other group of residents.

VIII

FINDINGS OF FACTS MADE REGARDING THE CIRCUMSTANCES LEADING UP TO THE PUBLIC HEARING

* * *

Deputy Commissioner David Kinloch was primarily responsible for the Department of Public Health's investigation of UFFI until he left the Department in the summer of 1979. In August, 1978, the then Deputy Commissioner Kinloch stated that levels of formaldehyde "less than 0.1 ppm would generally not be associated with health problems. Levels between 0.1 and 0.5 ppm could, but are usually not problem causing." On August 10, 1978, Deputy Commissioner Kinloch wrote a memorandum to local boards of health indicating that the Department considered that formaldehyde at levels less than 0.1 ppm would not be associated with any symptoms.

By August 11, 1978, NAUFIM was given a list of twenty-nine specific complaints. On August 18th, 1978, the Department announced a $10,000.00 grant to conduct further air quality tests to measure formaldehyde vapor in UFFI homes, other homes, and various outdoor sites, with the testing to be completed as of September. In fact, there was no such grant ever made, and consequently, no such testing ever undertaken.

• • •

On February 29, 1979, the present Commissioner of Public Health, whose term had commenced in January, announced that his department would hold late March hearings "on a proposal to ban the sale of urea formaldehyde foam insulation in the Commonwealth". The Commissioner stated that three sources; available information, the Department's analysis of its own testing, and a consultation with the Executive Office of Consumer Affairs had led to the belief "that the insulation foam precipitates too many health problems suggestive of formaldehyde irritation to families".

• • •

[T]he third ground or source which the Commissioner cited publicly, "available information", assumes considerable importance. This is an enumerated ground for his belief that "insulation foam precipitates too many health problems". I find as a fact that when the Commissioner stated the same as a basis of his belief that he meant that information within public availability which he anticipated would be forthcoming in the hearings he was then scheduling. More particularly, this finding is strengthened by the very next sentence in this public utterance: "I believe these hearings will serve as an excellent forum to discover the wide spread health effects of foam insulation." It is important to note that he did not describe the information upon which he based his belief other than to say it was "available". It is also important to emphasize that he considered the hearings as an appropriate way to "discover" these widespread poor effects. Therefore, the evidence supports and I draw the inference that on February 22, 1979, prior to the scheduling of any public hearing, the case against UFFI had been prejudged.

IX

FINDINGS REGARDING THE PUBLIC HEARINGS OF MARCH 29 AND MARCH 30, 1979

On March 7, 1979, the Commissioner of the Department of Public Health gave notice of the public hearing. . . . This public hearing was scheduled to be held on Thursday, March 29, 1979, at 10:00 A.M. A second day was conditionally further provided, to wit, ". . . and, if necessary, Friday, March 30, 1979." Written testimonial submissions could be made prior to the hearing by delivery to a named employee of the department, and also, copies of the proposed regulations would likewise be furnished by that particular employee. However, it was expressly stated "all written testimony must be submitted no later than March 30, 1979, unless such time for submission was expressly extended."

NAUFIM, Borden, C. P. Chemical, Aerolite and others objected to this procedure, and there was a series of communication from these persons both before and after a March 14th meeting between NAUFIM and the Department. Principally, the representatives of industry and some particular makers objected to the short time between the hearing notice and the hearing date. As a factual matter, this period of time is the shortest permissive time period that is articulated in Chapter 30A, Section 2. The Department settled on a procedure for this hearing wherein the proponents of the regulation would have the morning sessions, while the opponents would have the afternoons of the 29th and 30th. The public hearings would run from 10:00 to 5:00, with a short lunch break. However, there was to be no automatic fifty-fifty split of the time. This discussed organizational format also was to include a panel of persons who had expertise in the areas relating to the proposed regulations, and who could query those who appeared to offer testimony.

The industry representatives were not given copies of the consumer complaints, nor were they given any opportunity to discuss the test methodology utilized by the Department of Public Health in assessing the levels of formaldehyde in the 198 homes which had been surveyed. No meaningful discovery permitted. More particularly, the industry, Borden, C. P. Chemical, and others requested an adjudicatory hearing, and further argued that there had to be some consideration of environmental impact. These contentions were reduced to written motions, as, for example, a motion to withdraw the proposed regulations, a motion for adjudicatory hearing, a motion for certain procedural rights.

• • •

The proponents of the regulation then went forward with the Secretary of Consumer Affairs, who first offered testimony and exhibits, and then turned over the presentment of this cause to the

Coordinator of Consumer Activities, one Barbara Neuman. Thereafter, Barbara Neuman offered testimony and introduced the proponent's witnesses. All testimony was unsworn and not the subject of any cross-examination. It was subject to time limitations, and witnesses were warned when time was running out. Those who were not brief enough to avoid a time cutoff could submit a more detailed written statement. To the extent permitted, Borden and others participated in the hearing.

During the afternoon proceedings on the second and concluding day of the public hearing, counsel for Borden protested an attempt by the Secretary of Consumer Affairs to impeach the credibility of a prior industry witness, one French. She had asserted that a lunch break check of an undisclosed complaint file to which she denied industry access revealed French as inaccurate and, inferentially, untruthful.

* * *

X

FINDINGS CONCERNING THE SCOPE AND CONTENT OF THE ADMINISTRATIVE RECORD

* * *

From these two given propositions, the Commissioner justified the ban. He simply concluded any emission of formaldehyde is too much. He reasoned in two ways. The first involves shifting the burden away from the proponents of the ban and depositing it upon the industry without notice at the time of the hearing, but by announcing it in the summary of his findings as unsatisfied. The burden is upon those who would be regulated to demonstrate some "level of formaldehyde vapor that has been proven safe up to twenty-four hours per day, seven days weekly, over an in-

dividual lifetime" and the Commissioner concludes that no such level whatsoever had been so proved.

* * *

In sum, there was no evidence upon which the Commissioner would have been warranted in finding, 1) the ambient levels of formaldehyde in houses with UFFI to be materially different from houses without UFFI, 2) what percentage of incident rate of complaints is attributable to faulty installation, 3) what was the incident rate in UFFI homes; moreover, what was the incident rate in UFFI homes as compared to non-UFFI homes. Insofar as the same be a question of fact, I find the Commissioner has no basis for concluding that a significant number of individuals may incur significant harm as a proximate result of exposure to UFFI.

* * *

XI

FINDINGS CONCERNING THE DECEMBER 1979 AND AUGUST 1980 PUBLIC HEARINGS

* * *

XII

FINDINGS CONCERNING THE SCOPE AND EXTENT OF THE ADMINISTRATIVE RECORD RE DECEMBER 1979 AND AUGUST 1980 HEARINGS

A judicial review of the administrative data collected by way of the statements given at the public hearings and matters submitted in connection therein cannot be accomplished, since the adminis-

trative record is not complete. The public proceedings were not preserved nor transcribed or recorded, and therefore are not retrievable. However, the written materials submitted have been examined.

* * *

Since the Commissioner remained unable to draw certain necessary conclusions which would be grounded or warranted from the administrative data collected (as, for example, 1) the extent of UFFI emission, 2) as to the contribution of other urea formaldehyde resin products commonly found in all residents and 3) the number of persons affected, to name just three) the approach taken in promulgating these repurchase regulations remained the same as utilized in the ban regulations; to wit, the burden was upon industry to prove formaldehyde safe up to twenty-four hours a day over an individual lifetime. This was a burden which the Commissioner had already found industry could not meet.

* * *

XIII

FINDINGS OF FACT REGARDING REPURCHASE REGULATIONS

* * *

XIV

FINDINGS REGARDING REASONABLENESS OF AN ALTERNATIVE TO THE BAN

* * *

Borden, the other manufacturer actively participating in this litigation, and the Formaldehyde Institute, urge that licensure of installers and the promulgation of regulations establishing installation standards are feasible alternatives which would adequately protect the public interest.

* * *

[T]his Court now finds, insofar as it is a question of fact, that the Commissioner concluded that the administrative data was inadequate to support a finding either way as to whether or not proper installation criterion would eliminate or cure all experienced vapor problems. I also have made certain findings in Part V above regarding the suitability of licensing and regulating installation from the trial evidence (as distinguished from the administrative record) and there is no need to repeat those findings here. It is enough to point out that the Commissioner declined to consider regulation as an alternative to banning because of a lack of knowledge.

* * *

XV

FINDINGS REGARDING OTHER PLAINTIFFS

* * *

RULINGS OF LAW

Having found the facts, this Court sets forth separately below its conclusions thereon.

-A-

CHAPTER 94B REQUIRES AN ADJUDICATORY HEARING

* * *

Feasibility is essentially a question of fact. Here the facts are such that a hearing was clearly feasible. . . . Simply put, if it is feasible, and it was, to bring a court case against a group of defendants, then that group has sufficient common indicia to be identified for an adjudicative agency proceeding.

* * *

B

CHAPTER 30 A REQUIRES AN ADJUDICATORY HEARING

* * *

1.

First, I find that these adjudicatory proceedings are mandated by a fair reading of Chapter 94 B, Section 2, as applied to the facts of this case. The ban and repurchase regulation at issue seek to impose huge financial liabilities ultimately upon a small select group of manufacturers of a target product. The regulations are not only prospective but are retroactive and impose severe liabilities for past activity which was, at the time done, lawful and proper conduct. The Massachusetts repurchase power copied in essential detail from the federal statute, and the legislature enacted that Section 8 at the same time as it enacted Section 2. It is important to distinguish a Chapter 94 B proceeding from other types of agency hearings. A Chapter 94 B hearing is a proceeding against a thing, an object, or other article of commerce. The issues to be resolved at the hearing all concern the qualities and propensities of that particular res. The act mandates that specific findings by the Commissioner be made on the only relevant issue;

to wit, the degree of hazard, if any, the res presents. Therefore, the hearing is not legislative in nature dealing with any policy question; rather the hearing's sole object is to factually determine the attributes of the specific res.

* * *

The consolidated case at bar does not involve an obviously large and indeterminate grouping of interest . . . . The issues addressed by the administrative hearings were two: 1) Does a particular product have such dangerous characteristics as to be such a "hazardous substance" as that term is used in Section 1 of Chapter 94 B that the res ought to be classified as a "banned hazardous substance". As such the question focuses directly upon the nature and characteristics of the product and its manufacturing formulas, the standards, if any, utilized in its manufacture, storage, handling and shipping, the standards and customs of its distribution, its shelf life, the installation practices and procedures, licensing feasibility, its labeling and warning suitabilities. Therefore, although broad in scope, the scrutiny is narrow in its application, being limited to a particular item and the inquiry to determine and find the facts regarding its degree of hazard, if any, that the article possesses. 2) Should a specifically named group (UFFI home owners) be granted a right to "repurchase" under Chapter 94 B (constituting a complete removal and restoration) from the targeted group of makers of that particular article.[1]

* * *

However, I rule that the "functional suitability" test of *Cast Iron* is not applicable here. This ruling is made because of the nature of a Chapter 94 B hearing and also in reliance upon the

[1]It was this relatively small group of manufacturers that were singled out. Installers and distributors who might initially be found liable for repurchase were permitted under the regulations to pass on that liability in whole to the makers.

findings of fact in part above, that the industry members were an easily identifiable and non-diverse group. The res involved had an obvious spokesman, NAUFIM.

* * *

C

* * *

1.

First, both the ban and the re-purchase reguation [sic] considered together and considered separately and independent of each other constitute a deprivation of a property right accompanied by state action, and I so rule.

* * *

The agency record in this case is a huge gratuitous collection of unsworn written submissions and oral statements and urgings. Indeed, at least with respect to the re-purchase hearings it is not complete.

The plaintiffs attack the regulations under the claim of substantive due process. They seek a declaration of their rights. . . .

* * *

D.

THE BAN AND REPURCHASE
ARE ARBITRARY AND CAPRICIOUS

I find that the plaintiffs have sustained their burden and have established by a fair preponderance of the evidence that the imposition of both the ban and the repurchase regulations are without rational basis in fact.

Specifically I rule, 1) that it was arbitrary and capricious to classify exposure to formaldehyde as an irritant or as toxic at any level of concentration. Consequently the finding that formaldehyde is "hazardous" independent and irrespective of any given level of exposure was, likewise, without a rational basis in fact.

2) That, since the Commissioner was unable to find as a fact the amount of formaldehyde UFFI contributes to the indoor environment and since many other potential sources are present within the ordinary home, the selection of UFFI insulation for separate and different treatment was capricious.

* * *

3) That since the Commissioner could have easily undertaken a comparison study of the ambient levels of UFFI and non-UFFI homes and could have undertaken an epidemiological study and fixed an incident rate for symptoms allegedly caused by UFFI, the promulgation of the regulations without such knowledge was arbitrary and capricious. Even if this Court's ruling on the necessity for such adjudicatory hearings is deemed to be in error, certainly for an agency to promulgate administrative regulations rooted in ignorance, leaving the important issues of causal connection and contribution and incident rates unanswered and, indeed, even unexplored, is to perform its agency function in an irresponsible and totally arbitrary manner.

4) That the Commissioner's finding that UFFI creates an appreciable risk of harm to a significant number of persons was a finding not based upon any rational basis. The evidence established and I conclude that it is highly unlikely that any individual will experience any "substantial personal injury or substantial illness" as that phrase is used in Chapter 94B, Sec. 1, the proximate cause of which is an exposure to an unacceptable level of formaldehyde caused by a properly installed Tripolymer installation.

Likewise, since the evidence warrants, I find for the Formaldehyde Institute and Borden in that there is no rational basis upon which one may conclude that it is likely that significant numbers of persons will experience such a "substantial" injury or illness as the proximate result of formaldehyde exposure from UFFI insulation when it is properly installed.

5) That the agency finding that UFFI either "caused or significantly contributed" to certain adverse health symptoms experienced by the majority of nineteen consumers, and more specifically that that particular group constituted "a significant number in and of itself", when the Commissioner made neither a finding as to the number of complaints nor any findings as to the complaint ratio to the number of installations, is an arbitrary finding. Certainly "a majority of nineteen" is very significant if the whole is nineteen, less significant if ninety, discernable if nineteen hundred, miniscule if nineteen thousand. The number of persons suffering adverse health symptoms by itself is only a number; what gives the number its significance is its relationship to the entire group under study. To give a fraction a determining significance independent and irrespective of the quantity of the whole is not reasonable or rational. Perhaps the Commissioner sensed the same when he thereafter found "In all likelihood, substantial numbers of other persons were similarly affected". However, that finding was not footed in fact, but rather was grounded upon an unsupportdd [sic] supposition. To proceed to utilize the police power of the Commonwealth by imposing a ban upon a product based upon such supposition is arbitrary and capricious action.

6) That the ban is arbitrary and capricious since there has been no showing that less restrictive alternatives, such as licensing installers or establishing installation standards, would not property [sic] effectuate an adequate solution. The failure to conduct a less burdensome remedy was arbitrary.

7) That the repurchase regulations are arbitrary and capricious in requiring an industry member to expend substantial funds without ever affording it an opportunity to question the claimant, cross-examine witnesses, contest causation, or otherwise exercise minimal procedural rights to which it is entitled as a matter of due process of law. They are arbitrary and capricious in the refusal to allow the industry member to determine whether the UFFI at issue is its UFFI or even to allow an industry member to verify the existence of UFFI in the building at issue.

8) The repurchase regulations are arbitrary and capricious in requiring an industry member to repurchase UFFI as a result of the existence of certain health symptoms while precluding the introduction of any evidence tending to show that the symptoms in question are not caused by UFFI or formaldehyde while prohibiting the introduction of evidence on causation and not requiring any finding by the administrative reviewer that those symptoms are caused by UFFI.

9) The repurchase regulations are arbitrary and capricious in requiring an industry member to repurchase UFFI as a result of an occupant's having experienced one health symptom on one occasion only since the installation of UFFI and never having experienced that symptom again, and in denying the industry member any opportunity to be heard upon that issue.

10) A finding for Borden and the Institute is required because the repurchase regulations are arbitrary and capricious in precluding the introduction of any evidence as to the formaldehyde level in the indoor or outdoor ambient air and in failing to condition "repurchase" on a showing that there is any formaldehyde inside the home. In precluding the introduction of any evidence as to the presence of other sources of formaldehyde. [sic] and particularly by excluding the introduction of any evidence as to the presence of any indoor air pollutants, the regulations are arbitrary and capricious.

11) The repurchase regulations are arbitrary and capricious in imposing an improper burden of proof upon the industry member because they obligate the referee to find that the statements of the individual claimant are true unless the record "clearly and convincingly demonstrates that ... (those allegations) ... are untrue".

12) A finding for Borden and the Institute is required because the repurchase regulations do not provide for any actual and meaningful adjudicatory rights before a "Certificate of Right to Repurchase" is issued.

E.

THERE ARE SEVERAL ISSUES OF LAW THAT HAVE NOT BEEN PREVIOUSLY ADDRESSED BUT WHICH SHOULD BRIEFLY BE DISCUSSED:

* * *

Conclusion

* * *

Simply put this court rules that before the Commissioner can ban all future use of UFFI insulation, he must hold an adjudicatory hearing. (And in the alternative, if the legislative type hearing was sufficient, then there does not exist in the evidence presented at trial a sufficient basis which would warrant the conclusions which the Commissioner reached). Nothing contained herein prevents the Commissioner from undertaking such an adjudicatory hearing.

* * *

JOHN T. RONAN

John T. Ronan
Justice of the Superior Court

Entered:

APPENDIX D

Massachusetts Hazardous Substances Labelling Act

HAZARDOUS SUBSTANCES LABELING LAW

§ 1. Definitions

The following words as used in this chapter, unless the context otherwise requires shall have the following meanings:—

"Banned hazardous substance", any toy, or other article intended for use by children, which is a hazardous substance, or which bears or contains a hazardous substance susceptible of access to a child, or is otherwise hazardous because it presents electrical, mechanical or thermal hazards; or any hazardous substance intended or packaged in a form suitable for use in households, which the commissioner by regulation classifies as a "banned hazardous substance" on the basis of a finding that notwithstanding cautionary labeling required under this chapter, the degree or nature of the hazard involved in the presence or use of the substance in households is such that the protection of the public health and safety can be adequately served only by keeping the substance out of the channels of commerce. The commissioner, by regulation, shall, however, exempt articles, such as chemical sets, which by reason of their functional purpose, require the inclusion of the hazardous substance involved or necessarily present an electrical, mechanical, or thermal hazard, and which bear labeling giving adequate direction and warnings for safe use and are intended for use by children who have attained sufficient maturity and who may reasonably be expected to read and heed these warnings.

* * *

"Hazardous substance", any substance or mixture of substances which is toxic, corrosive, an irritant, a strong sensitizer, flammable or which generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foresee-

able handling or use, including reasonable foreseeable ingestion by children, or any toy or other article intended for use by children which presents an electrical, mechanical or thermal hazard. It shall include any radioactive substance if, with respect to such substance as used in a particular class of article or as packaged, the commissioner determines by regulation that the substance is sufficiently hazardous to require labeling in accordance with this chapter in order to protect the public health. It shall not include economic poisons subject to the Federal Insecticide, Fungicide and Rodenticide Act, unless the commissioner finds that such economic poison is not adequately labeled for the protection of the public health, nor foods, drugs and cosmetics subject to the Federal Drug and Cosmetic Act or to chapter ninety-four, nor substances intended for use as fuels when stored in containers and used in heating, cooking, or refrigeration systems. It shall include any article which is not itself an economic poison within the meaning of the Federal Insecticide, Fungicide and Rodenticide Act but which is a hazardous substance within the meaning of this definition by reason of bearing or containing such economic poison.

* * *

§ 2. Commissioner; general powers

(a) Whenever in the judgment of the commissioner such action will promote the objectives of this chapter by avoiding or resolving uncertainty as to its application, the commissioner may by reasonable rules and regulations declare to be a hazardous substance, for the purpose of this chapter, any substance or mixture of substances which he finds meets the requirements of the same term as defined in section one.

(b) If the commissioner finds that the requirements of section one, as to labeling of a "misbranded hazardous substance" are not adequate for the protection of the public health and safety in view of the special hazard presented by any particular hazardous sub-

stance, he may by regulation establish such reasonable variations of additional label requirements as he finds necessary for the protection of the public health and safety; and any hazardous substance intended, or packaged in a form suitable, for use in the household or by children, which fails to bear a label in accordance with these regulations shall be deemed to be a misbranded hazardous substance.

(c) If the commissioner finds that, because of the size of the package involved or because of the minor hazard presented by the substance contained therein, or for other good and sufficient reasons, full compliance with the labeling requirements otherwise applicable under this chapter is impracticable or is not necessary for the adequate protection of the public health and safety, he shall promulgate regulations exempting the substance from these requirements, to an extent he determines consistent with adequate protection of the public health and safety.

(d) If the commissioner finds that an article subject to this chapter cannot be labeled adequately to protect the public health and safety, or the article presents an imminent danger to the public health and safety, he may declare the article to be a banned hazardous substance and require its removal from commerce.

The commissioner shall cause the regulations promulgated under this chapter to conform, insofar as practicable, with the regulations established pursuant to the Federal Hazardous Substances Act.

* * *

§ 8. Repurchase of banned hazardous substances

In the case of any article or substance sold by its manufacturer, distributor, or dealer which is a banned hazardous substance, whether or not it was such at the time of its sale, such article or substance shall, in accordance with regulations of the commissioner, be repurchased as follows:

(*a*) The manufacturer of any such article or substance shall repurchase it from the person to whom he sold it, and shall refund

to that person the purchase price paid for such article or substance. If that person repurchased such article or substance pursuant to the provisions in this section, the manufacturer shall reimburse him for any amounts paid in connection with its repurchase, and reimburse such person for any reasonable and necessary expenses incurred in returning it to the manufacturer.

(*b*) The distributor of any such article or substance shall repurchase it from the person to whom he sold it, and shall refund to that person the purchase price paid for such article or substance. If that person has repurchased such article or substance pursuant to the provisions of this section, the distributor shall reimburse him for any amounts paid for the return of such article or substance in connection with its repurchase and reimburse that person for any reasonable and necessary expenses incurred in returning it to the distributor.

(*c*) In the case of any such article or substance sold at retail by a dealer, if the person who purchased it from the dealer returns it to him, the dealer shall refund the purchase price paid for it and reimburse him for any reasonable and necessary transportation charges incurred in its return.

For the purpose of this section, (1) the term "manufacturer" includes an importer for resale, and (2) a dealer who sells at wholesale an article or substance shall with respect to that sale be considered the distributor of that article or substance.

APPENDIX E

Regulations Concerning Hazardous Substances

E1

REGULATIONS CONCERNING HAZARDOUS SUBSTANCES 105 CMR 650

Effective Date: November 14, 1979

105 CMR: DEPARTMENT OF PUBLIC HEALTH

105 CMR is amended by adding the following chapter:

105 CMR 650.000: REGULATIONS CONCERNING HAZARDOUS SUBSTANCES

Section

650.001	Purpose
650.002	Authority
650.003	Scope
650.004	Statutory Definitions
650.005	Supplemental Definitions
650.006	Incorporation of Findings Made Pursuant to the Federal Hazardous Substances Act
(650.007	through 650.009 Reserved)
650.010	Hazardous Mixtures
(650.011	through 650.014 Reserved)
650.015	Listing of Toxic Substances
650.016	Listing of Irritants
650.017	Listing of Hazardous Substances
(650.018	through 650.019 Reserved)
650.020	Listing of Banned Hazardous Substances
(650.021	through 650.099 Reserved)
650.100	Substances Determined to be Special Hazards
(650.101	through 650.219 Reserved)
650.220	Repurchase of Banned Hazardous Substances
650.221	Modification or Replacement of Banned Hazardous Substances in Lieu of Repurchase
650.222	Repurchase of Urea-Formaldehyde Foamed-In-Place Insulation (UFFI)
(650.223	through 650.989 Reserved)
650.990	Severability

650.001: Purpose

To establish the administration and enforcement of regulations concerning hazardous substances.

650.002: Authority

The regulations are adopted under the authority of M.G.L. c.94B and M.G.L. c.111, ss. 3, 5, 6.

650.003: Scope

These regulations shall apply throughout the Commonwealth.

650.004: Definitions

(1) "Banned hazardous substance", any toy, or other article intended for use by children, which is a hazardous substance, or which bears [sic] contains a hazardous substance susceptible of access to a child, or is otherwise hazardous because it presents electrical, mechanical or thermal hazards; or any hazardous substance intended or packaged in a form suitable for use in households, which the commissioner by regulation classifies as a "banned hazardous substance" on the basis of a finding that notwithstanding cautionary labelling required under this chapter, the degree or nature of the hazard involved in the presence or use of the substance in households is such that the protection of the public health and safety can be adequately served only by keeping the substance out of the channels of commerce. The commissioner, by regulation, shall, however, exempt articles, such as chemical sets, which by reason of their functional purpose, require the inclusion of the hazardous substance involved or necessarily present an electrical, mechancical [sic], or thermal hazard, and which bear labelling giving adequate direction and warnings for safe use and are intended for use by children who have attained sufficient maturity and who may reasonably be expected to read and heed these warnings.

(2) "Combustible", any substance or mixture of substances which as a flash point from eighty degrees to and including one hundred and fifty degrees Fahrenheit, as determined by the Tagliabue Open Cup Tester.

(3) "Commerce", any and all commerce within the commonwealth, including the operation of any business or service establishment.

(4) "Commissioner", the commissioner of public health.

(5) "Corrosive", any substance which when in contact with living tissue will cause destruction of such tissue by chemical action.

(6) "Department", the department of public health.

(7) "Director", the director of the division of food and drugs in the department.

(8) "Division", the division of food and drugs in the department.

(9) "Electrical hazard", an article which in normal use, or when subjected to reasonably foreseeable damage or abuse by its design or manufacture, may cause personal injury or illness by electrical shock.

(10) "Extremely flammable", when used with respect to a substance, any substance which has a flash point at or below twenty degrees Fahrenheit as determined by the Tagliabue Open Cup Tester.

(11) "Flammable", when used with respect to a substance, any substance which has a flash point of above twenty degrees to and including eighty degrees Fahrenheit, as determined by the Tagliabue Open Cup Tester; when used with respect to all items of wearing apparel in sizes 0 through 6X intended to be worn primarily for sleeping or activities related to sleeping and for

fabric or related material intended or promoted for use in such wearing apparel, which exceeds the acceptance criteria specified in the federal children's sleepwear standard, DOC FF 3-71, and determined by an appropriate test performed in accordance with said standard; or when used with respect to all items of wearing apparel in sizes 7 through 14 intended to be worn primarily for sleeping or activities related to sleeping and for fabric or related material intended or promoted for use in such wearing apparel, which exceeds the acceptance criteria specified in the federal children's sleepwear standard, FF 5-74, and determined by an appropriate test performed in accordance with said standard; provided, that the flammability of solids and of the contents of self-pressurized containers shall be determined by methods generally recognized as applicable to such containers and established by regulations issued by the commissioner.

(12) "Hazardous substance", any substance or mixture of substances which is toxic, corrosive, an irritant, a strong sensitizer, flammable or which generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonable foreseeable ingestion by children, or any toy or other article intended for use by children which presents an electrical, mechanical or thermal hazard. It shall include any radioactive substance if, with respect to such substance as used in a particular class of article or as packaged, the commissioner determines by regulation that the substance is sufficiently hazardous to require labelling in accordance with this chapter in order to protect the public health. It shall not include economic poisons subject to the Federal Insecticide, Fungicide and Rodenticide Act, unless the Commissioner finds that such economic poison is not adequately labeled for the protection of the public health, nor foods, drugs and cosmetics subject to the

Federal Drug and Cosmetic Act or to chapter ninety-four nor substances intended for use as fuels when stored in containers and used in heating, cooking, or refrigeration systems. It shall include any article which is not itself an economic poison within the meaning of the Federal Insecticide, Fungicide and Rodenticide Act but which is a hazardous substance within the meaning of this definition by reason of bearing or containing such economic poison.

(13) "Hazardous substances intended or packaged in a form suitable for use in the household", means any hazardous substance, whether or not packaged, that under any customary or reasonably foreseeable condition of purchase, storage, or use may be brought into or around a house, apartment, or other place where people dwell, or in or around any related building or shed including, but not limited to, a garage, carport, barn, or storage shed.

(14) "Highly toxic", when used with respect to a substance, any substance which (a) produces death within fourteen days in half or more than half of a group of ten or more laboratory white rats each weighing between two hundred and three hundred grams, at a single dose of fifty milligrams or less per kilogram of body weight, when orally administered; or (b) produces death within fourteen days in half or more than half of a group of ten or more laboratory white rats each weighing between two hundred and three hundred grams, when inhaled continuously for a period of one hour or less at an atmospheric concentration of two hundred parts per million by volume or less of gas or vapor or two milligrams per liter or less of mist or dust, provided such concentration is likely to be encountered by man when the substance is used in any reasonably foreseeable manner; or (c) produces death within fourteen days in half or more than half of a group of ten or more rabbits tests in a dosage of two hundred milligrams or less

per kilogram of body weight, when administered by continuous contact with the bare skin for twenty-four hours or less; provided that if the commissioner finds that available data on human experience with any substance indicate results different from those obtained on animals with the aforesaid dosages or concentrations, the human data shall take precedence.

(15) "Immediate container", excludes a package liner.

(16) "Inspector", an inspector of the division of food and drugs in the department.

(17) "Irritant", any substance not corrosive which on immediate, prolonged or repeated contact with normal living tissue will induce a local inflammatory reaction. "Irritant" includes "primary irritant to the skin" as well as substances irritant to the eye or to mucous membranes. "Primary irritant" means a substance that is not corrosive and that human experience data indicate is a primary irritant. "Eye irritant" means a substance that human experience data indicate is an irritant to the eye.

(18) "Label", a display of written, printed or graphic matter upon the immediate container of any substance, or in the case of an article which is unpackaged or is not packaged in an immediate container intended or suitable for delivery to the ultimate consumer, a display of such matter directly on the article involved or on a tag or other suitable material affixed thereto. A requirement made by or under the authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement or other information also appears on the outside container or wrapper, if any there be, unless it is easily legible through the outside container or wrapper and on all accompanying literature where there are directions for use, written or otherwise.

(19) "Mechanical hazard", an article which, in normal use or when subjected to reasonable foreseeable damage or abuse, by its design or manufacture presents an unreasonable risk of personal injury or illness from fracture, fragmentation or disassembly of the article, from propulsion of the article or any part or accessory thereof, from points or other protrusions, surfaces, edges, openings or closures, from moving parts, from lack or insufficiency of controls to reduce or stop motion, as a result of self-adhering characteristics of the article, because the article or any part or accessory thereof may be aspirated or ingested, because of instability, or any other aspect of the article's design or manufacture.

(20) "Misbranded package" or "misbranded package of a hazardous substance", a hazardous substance in a container, or not in a container if the substance can be handled or transported without one, which is intended or suitable for household use or personal use and which, except as otherwise provided by or pursuant to section two, fails to bear a label which states prominently in the English language, in conspicuous and legible type in contrast by typography, layout or color with other printed matter on the label, (a) the name and place of business of the manufacturer, packer, distributor or seller; (b) the common or usual name or the chemical name, if there be no common or usual name, of the hazardous substance or of each component which contributes substantially to its hazard, unless the commissioner by regulation permits or requires the use of a recognized generic name; (c) the signal word "DANGER" on substances which are corrosive, extremely flammable or highly toxic; (d) the signal word "WARNING" or "CAUTION" on all other hazardous substances; (e) an affirmative statement of the principal hazard or hazards, such as "Flammable", "Vapor Harmful", "Causes Burns", "Absorbed Through Skin", or similar wording descriptive of the hazard; (f) precautionary measures describing the action to be followed or

avoided, except when modified by regulations of the commissioner pursuant to section two; (g) instructions, when necessary or appropriate, for first-aid treatment; (h) the word "POISON" for any hazardous substance which is defined as "highly toxic" by this section; (i) instructions for handling and storage of packages which require special care in handling or storage; and (j) the statement "keep out of the reach of children", or its practical equivalent.

(21) "Person", includes an individual, partnership, corporation, association, or legal representative or agent.

(22) "Proximate result" means a result that follows in the course of events without an unforeseeable, intervening, independent cause.

(23) "Radioactive substance", a substance which emits ionizing radiation.

(24) "Reasonably foreseeable handling or use" includes the reasonably foreseeable accidental handling or use, not only by the purchaser or intended user of the product, but by all others in a household, specially children.

(25) "Strong sensitizer", a substance which will cause on normal living tissue, through an allergic or photodynamic process, a hypersensitivity which becomes evident on reapplication of the same substance and which is designated as such by the commissioner. Before designating any substance as a strong sensitizer, the commissioner, upon consideration of the frequency of occurrence and severity of the reaction, shall find that the substance has a significant potential for causing hypersensitivity.

(a) "Strong allergic sensitizer", is a substance that produces an allergenic sensitization in a substantial number of persons who come into contact with it. An allergic sensitization develops by means of an "antibody mechanism" in contradistinction to a primary irritant reaction which does

not arise because of the participation of an "antibody mechanism." An allergic reaction ordinarily does not develop on first contact because of necessity or prior exposure to the substance in question. The sensitized tissue exhibits a greatly increased capacity to react to subsequent exposures of the offending agent. Subsequent exposures may therefore produce severe reactions with little correlation to the amounts of excitant involved.

(b) "Photodynamic sensitizer", is a substance that causes an alteration in the skin or mucous membranes in general or to the skin or mucous membrane at the site of contact so that when these areas are subsequently exposed to ordinary sunlight (or equivalent radiant energy) an inflammatory reaction will develop.

(26) "Substantial personal injury or illness" means any injury or illness of a significant nature. It need not be severe or serious. What is excluded by the word "substantial" is a wholly insignificant or negligible injury or illness.

(27) "Thermal hazard", an article which, in normal use or when subjected to reasonably foreseeable damage or abuse, by its design or manufacture presents an unreasonable risk of personal injury or illness because of heat as from heated parts, substances or surfaces.

(28) "Toxic", when used with respect to a substance, any substance, other than a radioactive substance, which has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface.

650.005: Supplemental Definitions

(1) Toxic

(a) To give specificity to the definition of "toxic" in section 650.004(28) above, the following supplements that

definition: "Toxic" means any substance that produces death within 14 days in half or more than half of a group of:

1. White rats (each weighing between 200 and 300 grams) when a single dose of from 50 milligrams to 5 grams per kilogram of body weight is administered orally.

2. White rats (each weighing between 200 and 300 grams) when an atmospheric concentration of more than 200 parts per million but not more than 20,000 parts per million by volume of gas or vapor, or more than 2 but not more than 200 milligrams per liter by volume of mist or dust is inhaled continuously for 1 hour or less, if such concentration is likely to be encountered by humans when the substance is used in any reasonably foreseeable manner; and/or

3. Rabbits (each weighing between 2.3 and 3.0 kilograms) when a dosage of more than 200 milligrams but not more than 2 grams per kilogram of body weight is administered by continuous contact with the bare skin for 24 hours by the method described in 16 CFR s.1500.40 which is incorporated herein by reference.

(b) The number of animals tested shall be sufficient to give a statistically significant result and shall be in conformity with good pharmacological practices.

(c) "Toxic" also applies to any substance that is "toxic" (but not "highly toxic") on the basis of human experience.

(2) Irritant

The definition of "irritant" in section 650.004(17) above is supplemented by the following: "Irritant" includes "primary irritant to the skin" as well as substances irritant to the eye or to mucous membranes. "Primary irritant" means a substance that is not corrosive and that human experience data indicate is a primary irritant and/or means a substance that results in an empirical score of five or more when tested by the method described in 16 CFR

s.1500.41 which is incorporated herein by reference. "Eye irritant" means a substance that human experience data indicates is an irritant to the eye and/or means a substance for which a positive test is obtained when tested by the method described in 16 CFR s.1500.42 which is incorporated herein by reference.

650.006: Incorporation of Findings Made Pursuant to the Federal Hazardous Act, 15 USC s.1261 et seq. (FHSA)

(1) Hazardous and Banned Hazardous Substances

Any substance, mixture, or article found to be a hazardous substance or a banned hazardous substance pursuant to the FHSA is deemed such for all purposes under M.G.L. c.94B and regulations promulgated thereunder.

(2) Toxic, Highly Toxic, Irritant, Storing Sensitizer and other Substances.

Any substance, mixture, or article found to be toxic, highly toxic, an irritant, a strong sensitizer, corrosive, flammable or pressure generating pursuant to the FHSA is deemed such for all purposes under M.G.L. c.94B.

(105 CMR 650.006 through 650.009 Reserved)

650.010: Hazardous Mixtures

For a mixture of substances, the determination of whether the mixture is a "hazardous substance" should be based on the physical, chemical, and pharmacological characteristics of the mixture. A mixture of substances may therefore be less hazardous or more hazardous than its components because of synergistic or antagonistic reactions. It may not be possible to reach a fully satisfactory decision concerning the toxic, irritant, corrosive, flammable, sensitizing, or pressure-generating properties of a substance from what is known about its components or ingredients. The mixture itself should be tested.

(105 CMR 750.011 through 650.014 Reserved)

650.015: Listing of Toxic Substances

The commissioner finds the following substances to be toxic:

(1) Formaldehyde.

(2) Urea-formaldehyde foamed-in-place insulation.

650.016: Listing of Irritants

The Commissioner finds the following substances to be irritants:

(1) Formaldehyde.

(2) Urea-formaldehyde foamed-in-place insulation.

650.017: Listing of Hazardous Substances

The commissioner declares the following substances to be hazardous substances:

(1) Formaldehyde.

(2) Urea-formaldehyde foamed-in-place insulation.

(105 CMR 650.018 through 650.019 Reserved)

650.020: Banned Hazardous Substances

The commissioner declares the following articles to be banned hazardous substances and requires their removal from commerce:

(1) Urea-formaldehyde foamed-in-place insulation.

(105 CMR 650.021 through 650.099 Reserved)

650.100: Substances Determined to be Special Hazards

If the Commissioner finds that the requirements of Chapter 94B, s.1, as to labelling of a "misbranded hazardous substance" are not adequate for the protection of the public health and safety in view of the special hazard presented by any particular hazardous substance, he may by regulation establish such reasonable variations or additional label requirements as he finds necessary

for the protection of the public health and safety; and any hazardous substance intended, or packaged in a form suitable, for use in the household or by children which fails to bear a label in accordance with these regulations shall be deemed to be a misbranded hazardous substance.

(105 CMR 650.101 through 650.219 Reserved)

650.220: Repurchase of Banned Hazardous Substances

(1) Definitions used for the purposes of this chapter.

(a) The term "manufacturer" includes any person who manufactures or imports an article or substance for distribution or sale, including importers for resale, except that in the case of an article or substance distributed or sold under a name other than that of the actual manufacturer of the article or substance, the term "manufacturer" includes any person under whose name the article or substance is distributed or sold.

(b) The term "distributor" includes any person, including any person who would otherwise be considered a dealer, who sells an article or substance at wholesale.

(c) The term "dealer" includes any person who sells an article or substance at retail.

(d) The term "purchase price" means the amount of money paid to acquire an article or substance, including all taxes, but excluding transportation or shipping costs and finance, interest, or service changes [sic].

(e) The term "reasonable and necessary transportation charges," when used in connection with the return of an article or substance to a dealer, means:

1. The actual costs incurred in returning the product in any manner reasonably specified by the dealer, including personal conveyance; or

2. The actual costs incurred in returning the products by mail, commercial carrier, or any other manner, including personal conveyance, reasonably utilized in the absence of specific instructions by the dealer.

(f) The term "reasonable and necessary expense" when used in connection with the return of an article or substance to a distributor or manufacturer shall include the cost of labor, administration and transportation in the handling, processing, and shipping of that product.

(2) Repurchase

In the case of any article or substance sold by its manufacturer, distributor, or dealer which is a banned hazardous substance, whether or not it was such at the time of its sale, such article or substance shall, in accordance with regulations of the commissioner, be repurchased as follows:

(a) The manufacturer of any such article or substance shall repurchase it from the person to whom he sold it, and shall refund to that person the purchase price paid for such article or substance. If that person repurchased such article or substance pursuant to the provisions of this section, the manufacturer shall reimburse him for any amounts paid in connection with its repurchase, and reimburse such person for any reasonable and necessary expenses incurred in returning it to the manufacturer.

(b) The distributor of any such article or substance shall repurchase it from the person to whom he sold it, and shall refund to that person the purchase price paid for such article or substance. If that person has repurchased such article or substance pursuant to the provisions of this section, the distributor shall reimburse him for any amounts paid for the return of such article or substance in connection with its repurchase and reimburse that person for any reasonable and necessary expenses incurred in returning it to the distributor.

(c) In the case of any such article or substance sold at retail by a dealer, if the person who purchased it from the dealer returns it to him, the dealer shall refund the purchase price paid for it and reimburse him for any reasonable and necessary transportation charges incurred in its return.

(3) Notice of Banned Article of Substance Subject to Repurchase

The provisions of 16 C.F.R. 1500.202(f) are incorporated by reference except that the word Commissioner shall replace the words Consumer Product Safety Commission.

650.221: Modification or Replacement of Banned Hazardous Substances In Lieu of Repurchase

(1) Scope

This section clarifies and sets forth the conditions whereby repurchase of a banned hazardous article or substance will not [sic] be required under Section 650.220, but not under Section 650.222. Generally, repurchase will not be required whenever, with the consent of the owner, the banned hazardous article or substance is replaced or modified so as to no longer be considered banned.

(2) Modification

Any article or substance which is a "banned hazardous substance" (including any article or substance which became a banned hazardous substance because of some alteration which occurred after its introduction into interstate commerce and before its sale to an ultimate consumer) but which is thereafter modified so that it is no longer a banned hazardous substance shall not be subject to repurchase. Provided, however, that if the owner of a particular product which is a banned hazardous substance (for a reason other than an alteration by the owner) will not consent to modification of the product as an alternative to repurchase, the obligation of the party who sold that product to repurchase that product shall not be affected by the provisions of this section.

(3) Replacement

Any party who is obligated to repurchase an article which is a banned hazardous substance may replace it with an equivalent product which is not a banned hazardous substance. Provided, however, that if the owner of the particular product which is a banned hazardous substance (for reason other than an alteration by the owner) will not consent to replacement with an equivalent product which is not a banned hazardous substance, the obligation of the party who sold the banned hazardous substance to repurchase that product and refund the purchase price shall not be affected by the provisions of this section.

(4) Notification

In any case where a manufacturer, distributor, or dealer elects to offer to modify a banned hazardous substance or to replace it with an equivalent product which is not a banned hazardous substance as an alternative to repurchase, the notice provided pursuant to the requirements of Section 650.220(3) may be written to indicate the availability of the alternative of modification or replacement of the banned hazardous substance. Such notice, however, shall indicate that the owner of the banned hazardous substance may insist on repurchase.

(5) Expenses

In any case where a manufacturer, distributor, or dealer elects to offer to modify a banned hazardous substance or to replace it with an equivalent product which is not a banned hazardous substance as an alternative to repurchase, all expenses incurred in connection with the modification or replacement shall be borne by the party originally offering the modification or replacement.

650.222: Repurchase of Urea-Formaldehyde Foamed-In-Place Insulation (UFFI)

(1) When Repurchase is Required

UFFI must be repurchased only if the UFFI purchaser, or any adult occupant of the building insulated with UFFI, requests in writing within 18 months of the effective date of these regulations that UFFI be repurchased. Such written request shall be accompanied by proof of the reasonable cost of removal and restoration described in 650.222(8) below.

(2) Request for Repurchase

(a) Any person requesting repurchase under 650.222(1) shall first request that repurchase be made by the dealer from whom s/he purchased UFFI. If the dealer is unknown to such person, or if the dealer does not comply with any provision of 650.222(4), s/he may request that repurchase be performed by the distributor of component ingredients of UFFI used in that particular sale. If the distributor is unknown to such person, or if the distributor does not comply with any provision of 650.222(4), s/he may request that repurchase be performed by the manufacturer of component ingredients of UFFI used in the particular sale.

(b) The dealer, distributor or manufacturer making such a repurchase shall immediately notify any other manufacturer, distributor or dealer involved in that particular sale that such a repurchase has been made.

(c) The UFFI dealer, or the distributor or manufacturer of ingredients used in a particular retail sale of UFFI, shall provide the retail purchaser, on request, a notarized statement of the names and addresses of the UFFI dealer, distributor and/or manufacturer involved in that particular sale.

(3) Method of Repurchase from the Retail Purchaser

Repurchase from the retail purchaser of UFFI shall be made by:

(a) Paying the reasonable cost of removing the insulating material;

(b) Paying the reasonable cost of restoring, in a workpersonlike manner, all structures damaged, altered or removed in the process of removing the insulation;

(c) Refunding the purchase price.

(4) Payment of Costs Involved in Repurchase from the Retail Purchaser

The cost of repurchase from the retail purchaser shall be paid as follows:

(a) Refund of the purchase price and one third of the reasonable cost of removal and restoration shall be paid within 7 days of receipt of the written request for repurchase accompanied by proof of said reasonable cost;

(b) One third of the reasonable cost of removal and restoration shall be paid within 7 days of receipt of a notarized statement from the person doing the removal and/or restoration that said work is at least one half complete;

(c) One third of said reasonable cost shall be paid upon receipt of a notarized statement from the person doing the removal and/or restoration that said work has been completed.

(5) Repurchase from the Retail Dealer, Installer or Distributor

Once the dealer has repurchased UFFI from the retail purchaser, the distributor of component ingredients of UFFI shall repurchase UFFI from the dealer installer, and/or the

manufacturer of component ingredients of UFFI shall repurchase UFFI from the distributor, as follows:

(a) By refunding the purchase price paid for these component ingredients;

(b) By reimbursing for any amounts paid in connection with the repurchase of these items pursuant to 650.222(3)-(4) above;

(c) By reimbursing for any reasonable and necessary expenses incurred in providing reasonable proof of the removal of any UFFI made from these ingredients as described in 650.222(6) below.

(6) Method of Repurchase After Removal of UFFI

Once UFFI has been removed, further repurchasing shall not require return of the insulating material. Reasonable proof of removal shall entitle dealers and distributors to refund of the purchase price and reimbursement for all amounts reasonably incurred under any provision of this section from distributors and manufacturers of component ingredients of UFFI.

(7) Repurchase by Manufacturers

In the event that component ingredients of UFFI made by more than one manufacturer are removed from a single building pursuant to a single retail sale of UFFI, all manufacturers of ingredients used in that retail sale of UFFI will each pay equal shares of the cost of repurchase.

(8) Definition of "Reasonable Cost"

For purposes of this section, the "reasonable cost" of removal or restoration shall include the lowest of at least three estimates of said cost procured by the UFFI retail purchaser from persons engaged in the construction business. The UFFI retail purchaser may incur costs for removal and/or restoration exceeding the "reasonable cost" as here defined if s/he pays the difference between the "reasonable cost" and the actual cost incurred.

(9) Alternatives to Removal

(a) At any time within 18 months of the effective date of these regulations, as long as no person entitled to removal requests repurchase of UFFI, any person(s) entitled to removal may enter into written agreement(s) with the dealer, distributor, and/or manufacturer of UFFI requiring that any or all of said dealer, distributor and/or manufacturer attempt to cure any problems associated with UFFI by specified means other than removal.

(b) Any time within eighteen (18) months after such written agreement, any or all of the person(s) electing such alternative cure may, within their sole discretion, terminate said written agreement and require that UFFI be repurchased as described in 650.222(1)-(4) above. Said person(s) shall terminate by mailing a written statement of intent to terminate to the business address of the dealer, distributor and/or manufacturer with whom the agreement was made. This termination shall constitute a request for removal within the meaning of 650.222(1) above.

(10) Other Rights and Liabilities

Nothing in this section shall be construed as affecting the rights and liabilities of any person other than those rights and liabilities stated in this section.

(105 CMR 650.223 through 650.989 Reserved)

650.990: Severability

Any section, subsection, paragraph or provision of this chapter declared illegal or unconstitutional by a court of competent jurisdiction is severable from this chapter.

REGULATIONS CONCERNING REPURCHASE OF BANNED HAZARDOUS SUBSTANCES

105 CMR 650.220 and 222

Effective Date: November 20, 1980

105 CMR: DEPARTMENT OF PUBLIC HEALTH

105 CMR is amended by deleting sub-section 650.220(3) and by deleting sections 650.222 through 650.990, and by inserting in place thereof the following:

105 CMR 650.000: REGULATIONS CONCERNING HAZARDOUS SUBSTANCES

Section

650.220 Repurchase of Banned Hazardous Substances

650.222 Repurchase of Urea-Formaldehyde Foamed in Place Insulation (UFFI)

(650.223 through 650.889: Reserved)

650.990 Severability

650.220: Repurchase of Banned Hazardous Substances

(3) *Notice of Banned Article or Substance Subject to Repurchase.*

The provisions of 16 C.F.R. 150.202(f) are incorporated by reference except that the words "Commissioner of Public Health" shall replace the words "Consumer Product Safety Commission," and, for purposes of repurchase of urea-formaldehyde foamed-in-place insulation (UFFI), the provisions of 105 CMR 650.222(0) shall apply in lieu of 16 C.F.R. 150.202(f).

650.222: Repurchase of Urea-Formaldehyde Foamed-in-Place Insulation (UFFI)

(A) *Definitions.*

For purposes of this section, the following words shall have the following meanings:

(1) The term "installer" shall include any person who makes a retail sale of UFFI.

(2) The term "distributor" shall include any person, including any person who would otherwise be considered a dealer or installer, who sells UFFI or component ingredients of UFFI at wholesale.

(3) The term "manufacturer" shall include any person who manufacture [sic] UFFI or component ingredients of UFFI for distribution or sale, including importers for resale, except that, in the case of UFFI or component ingredients of UFFI distributed or sold under a name other than that of the actual manufacturer, the term "manufacturer" shall include any person under whose name the UFFI is distributed or sold.

(4) The term "component ingredients of UFFI" shall mean urea-formaldehyde resin and foaming agent.

(5) The term "occupant" shall mean a resident who deems her/himself to be an occupant. For purposes of s. 650.222(B)(3), however:

(a) Residents who deem themselves to be occupants shall become occupants on the first day of the period of occupancy during which they deem themselves to be occupants; and

(b) Any person who resides in a UFFI-insulated building continuously for 12 consecutive months or more beginning with the date of installation of UFFI in said building or later shall be deemed an occupant of said building for the period beginning on the first day of said 12 month period.

(6) The term "period of occupancy" shall mean any period of time during which a resident occupies a building continuously.

(7) The term "former occupant" shall mean a person who was an occupant of a UFFI-insulated building before a request for repurchase was made, but who is not an occupant of said building at the time a request for repurchase of UFFI from said building is made.

(8) Whenever a document is hand-delivered pursuant to these regulations, the term "mailing date" shall mean the date the document was received.

(B) *Request for Repurchase*

(1) UFFI must be repurchased on request as provided by these regulations.

(2) An owner of a UFFI insulated building shall request repurchase by mailing or hand-delivering to the Department of Public Health the following documents:

(a) A statement signed under the pains and penalties of perjury from an owner of a UFFI-insulated building stating:

1. that s/he requests that UFFI be repurchased from a building located at specific address;

2. that s/he is an owner of said building;

3. that UFFI was installed in said building, stating the date of installation, if known, and, if the person requesting repurchase was not the person who purchased the UFFI, the name of the person who purchased the UFFI, if known;

4. If s/he is not residing in the UFFI-insulated building, her/his present address;

5. the names and addresses, if known, of the installer, distributor and manufacturer of the UFFI installed in said building. If more than one name or address is known for any given installer, distributor or manufacturer, all names and addresses shall be provided.

(b) A statement signed under the pains and penalties of perjury from an occupant of said UFFI-insulated building, a former occupant of said building, or a person

legally responsible for such an occupant or former occupant, stating:

1. that the occupant or former occupant has suffered adverse health symptoms which occurred, or were aggravated, after the occupant or former occupant was exposed to UFFI as an occupant of said UFFI-insulated building;

2. that said symptoms occurred while (although not exclusively while) said occupant was present in said UFFI-insulated building.

(c) Copies of any written contracts or communications in her/his possession between her/him and the installer, distributor or manufacturer of UFFI installed in her/his building.

(3) Requests for repurchase based upon the health symptoms of any person who was an occupant of said building between the date of installation of UFFI and the effective date of these regulations must be made within 18 months after the effective date of these regulations.

Requests for repurchase based upon the health symptoms of any person who becomes an occupant of said building on or after the effective date of these regulations must be made no later than 18 months from the date said person becomes an occupant of said building. Provided, however, that all requests for repurchase must be made within 20 years of the effective date of these regulations.

(C) *Right to Review*

Once an owner of a UFFI-insulated building has requested that UFFI be repurchased, the installer, distributor or manufacturer upon whom the request has been served pursuant to 650.222(D) below may seek review of the request for repurchase in accordance with these regulations.

(D) *Service on Industry*

(1) If the identity of the installer, distributor or manufacturer is known to the person requesting repurchase or the Department of Public Health:

(a) Upon receipt of the documents described in 650.222(B) above, the Department of Public Health will mail or hand-deliver to each industry member whose identity is known:

1. a copy of the documents described in 650.222(B) above;

2. a notice of right to review; and

3. a list of the industry members to whom said documents and notice were mailed or hand-delivered.

(b) The notice of right to review will state that the installer, distributor or manufacturer may seek review of the request for repurchase in accordance with these regulations by mailing or hand-delivering a request for review to the Department and to the person who has requested repurchase on a form provided by the Department no later than 15 business days after the mailing date of the notice of right to review. The legal referee designated by the Commissioner pursuant to 650.222(G) below may accept a request for review filed after the 15 day limit only if such request is filed no more than 5 business days after such limit and only if said referee finds that acceptance of a late filing is necessary to prevent manifest injustice.

(c) At the time review is requested, the person requesting review shall mail or hand-deliver to the Department and to the person requesting repurchase copies of any written contracts or communications in her/his possession between her/him and the person requesting repurchase.

(d) Once review has been requested, the Department shall mail or hand-deliver to the person requesting repurchase a notice stating that review has been requested and notifying her/him of the procedures required by 650.222(E) below.

(e) Any mailing made by the Department pursuant to this section may be either by ordinary mail, postage prepaid, or by certified mail, return receipt requested.

(f) Any manufacturer, distributor or installer who receives notice from the Department pursuant to 650.222(D)(1)(a)-(c) above shall, no later than 10 business days after the mailing date of said notice, mail or hand deliver to the Department a list of names and addresses of any other installer(s), distributor(s), or manufacturer(s) whom s/he knows or has reason to believe was (were) involved in manufacturing, distributing, in stalling or selling the UFFI in question or the component ingredients of the UFFI in question. Upon receipt of such list(s), the Department shall immediately notify each installer, distributor, or manufacturer so identified of the request for repurchase and each such installer, distributor and manufacturer shall have the right to request review as set forth in 650.222(D)(1)(a)-(c) above.

(g) In addition to, or as an alternative to, the notice provided in 650.222(D)(1)(a)-(c) above, the Department may notify manufacturers, distributors and installers by any means determined to be reasonable by the Department.

(2) If the identity of the manufacturer, distributor or installer is not known to the person requesting repurchase, to the Department or to any identified installer, distributor or manufacturer:

(a) This shall not prejudice in any way the right of the person requesting repurchase to secure a "Certificate of Right to Repurchase" entitling her/him to repurchase by any installer, distributor or manufacturer who has been identified.

(b) The eighteen month period within which repurchase must be requested will not begin to run as against unidentified installers, distributors or manufacturers until they have been identified. Once any installer, distributor or manufacturer has repurchased UFFI from the person requesting repurchase, however, said person has no further right to repurchase.

(3) Within thirty days of the effective date of these regulations, all distributors and manufacturers who have sold UFFI or component ingredients of UFFI in Massachusetts shall mail or hand-deliver the following to the Department:

(a) A list of all known or ascertainable names and addresses of manufacturers, distributors and installers with whom they have done business; and

(b) A list of all known or ascertainable names and addresses of persons who have made retail purchases of UFFI, the component ingredients of which were manufactured or distributed by them.

(4) The lists described in 650.222(D)(3) above shall include all names and addresses which are known or which can be discovered by reasonably diligent efforts, and all names and addresses which are in the possession, custody or control of the installer, distributor or manufacturer. "Possession, custody or control" includes possession, custody or control by any person acting or purporting to act on behalf of the installer, distributor or manufacturer whenever the installer, distributor or manufacturer has knowledge that said person is acting or purporting to act on her/his behalf.

(5) The installer, distributor or manufacturer requesting review shall pay the cost of the referees designated by the Commissioner pursuant to 650.222(G) below. If more than one person requests review, this cost will be shared by those requesting review on a pro-rata basis. Once review is requested, the Department will bill each person requesting review for her/his portion of the cost of the referee. Within 15 business days of the mailing date of this bill, the person(s)

requesting review must remit to a fiscal intermediary designated by the Commissioner her/his portion of the cost of the referees as billed by the Department. Said fiscal intermediary shall pay all money so collected, less the reasonable cost of administering said funds, to the referees designated by the Commissioner in each individual case. Any installer, distributor or manufacturer who fails to remit this money within the time required shall forfeit her/his right to review.

(E) *When Review is Requested*

(1) Once review has been requested, the person requesting repurchase, or the occupant or former occupant or person legally responsible for such an occupant who has submitted an affidavit pursuant to 650.222(B)(2) above, must obtain from a physician licensed to practice medicine in Massachusetts a report concerning the occupant or former occupant of the UFFI-insulated building, stating the following:

(a) a brief description of relevant medical history;

(b) a list of symptoms, if any;

(c) a diagnosis, if any;

(d) the foundation for any diagnosis.

(2) A copy of said report shall be mailed or hand-delivered to the Department and to the person requesting review no later than 6 months after the mailing date of the notice described in 650.222(D)(1)(d) above.

(3) The person obtaining said report shall mail or hand-deliver to the Department and to the person requesting review a written statement authorizing the physician who wrote said report to release to the person requesting review any written medical record in the possession of said physician or used by her/him in making the diagnosis described above, excluding mental health records and including the report described in 650.222(E)(1) above. The person

requesting repurchase shall inform the Department of the date on which this written statement was mailed or hand-delivered to the person requesting review.

(4) No later than 20 business days after the mailing date of the report described in 650.222(E)(1) above, or of the authorization described in 650.222(E)(3) above, whichever is later, the installer, distributor or manufacturer who has requested review may mail or hand-deliver to the Department and to the person requesting repurchase evidence tending to show:

(a) that the person requesting repurchase is not an owner of a UFFI-insulted building;

(b) the UFFI was not installed in said building;

(c) the UFFI was not installed in said building on the date(s) specified;

(d) that an occupant or former occupant of said building did not experience the symptoms in the time or manner claimed;

(e) that the request for repurchase was not timely filed;

(f) that the symptoms experienced are not characteristics of exposure to formaldehyde because they are not among the following symptoms:

1. respiratory irritation (including but not limited to sore throat, sneezing, coryza, dryness, cough);

2. respiratory difficulty (including but not limited to congestion, shortness of breath, bronchitis, tightness of chest);

3. nosebleed;

4. nausea;

5. headache;

6. vomitting;

7. dizziness;

8. fatigue (including but not limited to drowsiness, weakness);

9. skin irritation (including but not limited to rash, dry skin);

10. eye irritation (including but not limited to watery eyes, tearing, eye discharge);

11. ear irritation;

12. laryngitis;

(g) that the physician who has written a report as described in 650.222(E)(1) above is not licensed to practice medicine in Massachusetts;

(h) that said physician's signature is not genuine;

(i) that said medical report was fraudulently procured;

(j) that the installer, distributor or manufacturer who has requested review did not in fact manufacturer, distribute or install the UFFI in question.

(5) No other written evidence may be submitted or considered. This excludes, but is not limited to, evidence of the following:

(a) test results relating to the formaldehyde content of any air sample; and

(b) evidence tending to show the presence of any possible source of formaldehyde other than UFFI.

(6) The person requesting repurchase may mail written evidence tending to rebut the evidence described in 650.222(E)(4) above to the Department and to the person

who has requested review no later than 20 business days after the mailing date of the evidence described in 650.222(E)(4) above.

(7) Upon receipt of the written material described above, the Department shall forward such written material to a medical referee and a legal referee designated by the Commissioner pursuant to 650.222(G) below.

(8) Each referee shall review all written material submitted pursuant to 650.222(B) and 650.222(E)(1)-(7) above and may request additional submissions only if a form is incomplete due to lack of answers to questions or uncompleted blanks, if the affidavits filed under 650.222(B) fail to include one or more of the statements required by that section or if any statement in said affidavits is incomplete, or if the doctor's report is incomplete. The legal referee may also request additional submissions if s/he concludes that, without fault of the person requesting repurchase, the physician writing a report pursuant to 650.222(E)(1) above is not licensed to practice medicine in Massachusetts, or said physician's signature is not genuine or the medical report was fraudulently procured.

(9) *Findings and Conclusions of the Referees.*

(a) If a person requesting repurchase has submitted affidavits as required by 650.222(B) above, the medical referee shall find that:

1. an occupant or former occupant of a UFFI-insulated building experienced adverse health symptoms;

2. the occupant's or former occupant's adverse health symptoms did occur, or were aggravated, after the occupant or former occupant was exposed to UFFI as an occupant of said UFFI-insulated building; and

3. said symptoms occurred while (although not exclusively while) the occupant or former occupant was present in said UFFI-insulated building; and

4. the occupant's or former occupant's symptoms are characteristic of formaldehyde exposure;

unless the medical referee concludes that the record clearly and convincingly demonstrates that 650.222(E)(9)(a)(1)-(4) are untrue.

(b) If a person requesting repurchase has submitted affidavits as required by 650.222(B) above, the legal referee shall find that:

1. the person requesting repurchase is an owner of a UFFI-insulated building; and

2. UFFI was installed in said building; and

3. the request for repurchase was timely filed; and

4. the occupant or former occupant who has submitted an affidavit was an occupant or former occupant of said building; and

5. the installer, distributor or manufacturer who is party to the review procedure installed, distributed or manufactured the UFFI in question or component ingredients of the UFFI in question;

unless the legal referee finds that the record clearly and convincingly demonstrates that 650.222(E)(9)(b)(1)-(5) are untrue.

(c) If the medical referee makes the findings described in 650.222(E)(9)(a) and the legal referee makes the findings described in 650.222(E)(9)(b), the Commissioner shall issue a "Certificate of Right to Repurchase" to the person requesting repurchase and to all persons served with notice of the request for repurchase pursuant to 650.222(D) above.

(d) Provided, however, that, if the legal referee concludes that the record demonstrates by a preponderance of the evidence that the physician who wrote the medical report described in 650.222(E)(1) above is not

licensed to practice medicine in Massachusetts, or that the said physician's signature is not genuine, or if the legal referee concludes that the record clearly and convincingly demonstrates that the medical report was fraudulently procured, then the Commissioner shall not issue a "Certificate of Right to Repurchase."

(e) The findings and conclusions of the referee shall be final.

(10) The legal referee may, in her/his discretion, extend any time limit contained in this section if an extension is necessary to prevent manifest injustice. Provided, however, that the time for requesting review as provided in 650.222(D)(1)(b) above may not be extended except as provided in that paragraph. Provided further that any request for an extension of time must be in writing and must be mailed or hand-delivered to the Department and to all other parties to the review procedure no later than 5 business days after the deadline sought to be extended unless the referee concludes that said 5 day deadline will cause manifest injustice.

(11) The installer, distributor or manufacturer requesting review shall pay any costs incurred by the person requesting repurchase pursuant to the repurchase process. These costs shall include, but shall not be limited to, mailing costs, copying costs, and the cost of preparing the report described in 650.222(E)(1) above. If more than one person requests review, these costs will be shared by those requesting review on a pro-rata basis.

(F) *Function of "Certificate of Right to Repurchase"*

(1) The "Certificate of Right to Repurchase" shall entitle the person requesting repurchase to repurchase of UFFI by any installer, distributor or manufacturer identified in said "Certificate." If the legal referee has concluded pursuant to 650.222(E)(9)(b) that a particular manufacturer, distributor or installer did not manufacture, distribute or install the

UFFI or the component ingredients of the UFFI in question, the "Certificate" shall not entitle the person requesting repurchase to repurchase by said person.

(2) Upon receipt of a "Certificate of Right to Repurchase" the person requesting repurchase may mail or hand-deliver a copy of said "Certificate" to either the installer, the distributor or the manufacturer identified in said "Certificate." If more than one manufacturer is so identified, the person requesting repurchase may mail or hand-deliver the "Certificate" to any one manufacturer.

(3) Any installer, distributor or manufacturer identified in a "Certificate" who receives a "Certificate" as provided in 650.222(F)(2) above must repurchase UFFI as required by 650.222(I) or (J) below.

(4) Any installer, distributor or manufacturer who repurchases UFFI shall notify any other installer, distributor or manufacturer identified in the "Certificate of Right to Repurchase" that s/he is repurchasing UFFI no later than 5 business days after the mailing date of the "Certificate."

(5) (a) If the installer, distributor or manufacturer fails to comply with any provision of 650.222(I)(2)(b)-(h), the person requesting repurchase may secure estimates and follow the procedure outlined in 650.222(I)(2)(j). In addition to any other available remedies against the person who has failed to comply, the person requesting repurchase may at the same time mail or hand-deliver the "Certificate" to another industry member identified in the "Certificate."

(b) If the installer, distributor, or manufacturer fails to comply with the provisions of 650.222(J)(4), in addition to any other available remedies available against the person who has failed to comply, the person requesting repurchase may mail or hand-deliver the "Certificate" to another industry member named in the "Certificate."

(c) Provided, however, that:

1. Once any installer, distributor or manufacturer has repurchased UFFI, the person requesting repurchase has no right to repurchase by any other installer, distributor or manufacturer; and

2. The person requesting repurchase shall not mail or hand-deliver the "Certificate" to more than one person identified in said "Certificate" unless the installer, distributor or manufacturer to whom the "Certificate" has been presented has failed to comply with the provisions of section 650.222(I)(2)(b)-(h) or (J)(4).

(G) *Selection of Referee*

(1) The Commissioner of the Department will select a panel of medical referees who shall be physicians licensed to practice medicine in Massachusetts. A list of potential medical referees shall be made available to anyone requesting such a list prior to the selection of said panel. The Commissioner will consider any written comments which concern the qualification of fitness of any potential medical referee to serve on the panel. The Commissioner will select as few medical referees as possible so that each referee will develop expertise in the process described by these regulations. The Commissioner shall designate one member of said panel to serve as medical referee in each case and to make decisions as set forth in 650.222(E)(8) and (9)(a) above.

(2) The Commissioner will designate one lawyer licensed to practice law in Massachusetts to serve as legal referee in each case and to make decisions as set forth in 650.222(E)(8) and (9)(b) and (d) and (10) above.

(H) *Where No Review is Requested*

(1) If no installer, distributor or manufacturer requests review within the time limits provided by 650.222(D)(1)(b)

above, the Department shall mail or hand-deliver to the person requesting review a "Certificate of Right to Repurchase." The person requesting the repurchase may utilize said "Certificate" as provided in 650.222(F) above.

(I) *Method of Repurchase Where UFFI Has Not Been Removed*

(1) Repurchase of UFFI shall be made by removing the insulating material, restoring, in a work-person-like manner, all structures damaged, altered or removed in the process of removing the insulation, and refunding the purchase price.

(2) The removal of the insulating material and the restoration of all structures altered, damaged or removed in the process of removal shall proceed as follows:

(a) The person requesting repurchase shall choose three persons engaged in the construction business in Massachusetts whom s/he deems competent and qualified to remove the insulating material and restore the building as provided in 650.222(I)(1) above. S/he shall mail or hand-deliver the names and addresses of these three persons to the installer, distributor or manufacturer to whom s/he has presented the "Certificate of Repurchase" (hereinafter "the responsible party"). If s/he so chooses, s/he may also inform these persons and/or the responsible person, orally or in writing, of the exact specifications according to which s/he would like the insulating material removed and the structure restored as provided in 650.222(I)(1) above.

(b) No later than 10 business days after the mailing date of said names and addresses, the responsible party must enter into negotiations with said contractors concerning a contract for removal of UFFI and restoration of the building. The responsible party must notify the person requesting repurchase in writing that said negotiations have commenced. Said notice must be received

by the person requesting repurchase no later than 15 business days after the mailing date of said names and addresses.

(c) No later than 30 days after the mailing date of the names of these 3 persons, the responsible party must enter a contract with one of these three persons for the removal of UFFI and the restoration of the building as provided in 650.222(I)(1) above. The responsible party must pay the cost of removal and restoration as provided in said contract. The responsible party shall mail or hand-deliver a copy of said contract to the person requesting repurchase as soon as it is executed.

(d) Every contract entered pursuant to 650.222(I)(2)(c) above shall include, at a minimum, the following terms:

1. All UFFI must be removed from every cavity into which it was blown.

2. If the person requesting repurchase requests it, after removal of all UFFI, each cavity must be treated with a neutralizing solution, such as ammonia.

3. The premises must be protected from damage during the removal and restoration process and must be clean and orderly upon completion of work.

4. All portions of the home (for example, interior walls, ceilings, exterior shingles, clapboards, etc.) altered or damaged during the removal process must be replaced with materials of equivalent kind, quality, and appearance. For example (the following examples are not contract terms):

a. If a single interior wall that is either painted or wallpapered must be removed in whole or in part in order to remove UFFI, then

the entire room must be re-painted or re-wallpapered unless the single wall can be made to look identical to other walls in the room by re-painting or re-wallpapering the single wall.

b. If shingles or clapboards must be removed from the exterior of the home, and one or more shingles or clapboards is altered in any way as a result of the removal process (e.g. in color, texture or appearance), all altered shingles or clapboards must be replaced by shingles or clapboards of the same kind and quality of wood, the same color, texture and appearance, and in all other ways of equivalent quality and appearance to those damaged.

c. If an interior floor is scratched or damaged by machinery used in the removal process, it must be refinished.

(e) If the person requesting repurchase notifies the responsible person orally or in writing that s/he plans to re-insulate the building with an alternative insulating material, the responsible party shall require the person doing the removal and restoration to permit the person requesting repurchase, or anyone acting as agent of the person requesting repurchase, to re-insulate while the removal or restoration work is underway at any time in the discretion of the person requesting repurchase. Any increase in the cost of repurchase caused by such re-insulation shall be borne by the person requesting repurchase.

(f) Any contract entered pursuant to 650.222(I)(2)(c) above must be completed within a reasonable time.

(g) No person requesting repurchase shall be asked or required to waive any rights hereunder or under any statute or regulation or at common law in order to exercise the right of repurchase as provided hereunder.

(h) No provision of any contract entered pursuant to 650.222(I)(2)(c) above shall limit the rights of the person requesting repurchase under this section.

(i) The person requesting repurchase waives no rights by permitting any person access to her/his building in order to permit performance of any contract entered pursuant to 650.222 (I)(2)(c) above.

(j) In the event that the responsible party does not comply with any provision of 650.222(I)(a)-(h), the person requesting repurchase may secure two estimates of the cost of removal and restoration from any two persons engaged in the construction business. The person requesting repurchase must mail or hand-deliver to the responsible party copies of these estimates plus a statement of the cost of securing these estimates. The responsible party must then pay the lowest of these two estimates, plus the cost of securing the two estimates and an amount equal of the purchase price paid by the retail purchaser to the installer for installation of UFFI into the building in question. These payments must be made no later than 10 business days after the mailing date of the estimates. The person requesting UFFI shall then remove UFFI from her/his building.

(3) Unless section 650.222(F)(5) or (I)(2)(j) applies, an amount equal to the purchase price paid by the retail purchaser to the installer for installation of UFFI into the building in question shall be refunded to the person requesting repurchase no later than 5 business days after the commencement of work pursuant to the contract entered under 650.222(I)(2)(c).

(J) *Method of Repurchase Where UFFI Has Been Removed Before Effective Date of These Regulations*

(1) If UFFI was removed prior to November 14, 1979, or between November 14, 1979 and the effective date of these regulations, UFFI shall be repurchased in accordance with this sub-section.

(2) The person who has requested repurchase shall mail or hand-deliver to the responsible party a statement signed under the pains and penalties of perjury stating:

(a) That UFFI has been removed from a building of which s/he is an owner;

(b) The approximate date UFFI was removed from said building;

(c) The name and address of the person(s) who removed the UFFI and of the person(s) who restored the building;

(d) The cost of removing the UFFI and restoring, in a work-personlike manner, all structures damaged, altered or removed in the process of such removal, excluding the cost re-insulation;

(e) That said cost includes the cost of exposing and removing the foam, treating of the cavity, and restoring the building, and does not include any cost unrelated to said removal and restoration.

(3) The person requesting repurchase shall mail or hand-deliver to the responsible party a copy of the contract(s) for said removal and restoration. Said contract shall describe the work contracted for and the cost of said work.

(4) Within 15 business days of the mailing date of this statement, of the contract(s) for removal and restoration, or of the "Certificate of Right to Repurchase," whichever is later, the responsible party shall pay the person requesting repurchase the cost of removing UFFI and restoring the building as stated in said statement or contract.

(K) *Repurchase From the Distributor or Installer*

If an installer has repurchased UFFI from an owner of a UFFI-insulated building, the distributor of the component ingredients of said UFFI shall repurchase UFFI from said installer, and if distributor has repurchased UFFI from an installer, the manufac-

turer of the component ingredients of said UFFI shall repurchase UFFI from said distributor, as follows:

(1) By refunding the purchase price paid for these ingredients;

(2) By reimbursing for any amounts paid in connection with the repurchase of these items pursuant to 650.222(I) or (J) above;

(3) By reimbursing for any reasonable and necessary expenses incurred in providing reasonable proof of the removal of UFFI as described in 650.222(L) below.

(L) *Method of Repurchase After Removal of UFFI by a Distributor or Installer*

Once UFFI has been removed by a distributor or installer, further repurchasing as permitted by 650.222(K) shall not require return of the insulating material. Reasonable proof of removal shall entitle installers and distributors to reimbursement from distributors and manufacturers of component ingredients of UFFI, respectively, as provided in 650.222(K) above.

(M) *Allocation of Responsibility for Refund of the Purchase Price*

(1) If the distributor repurchases UFFI from an owner of a UFFI-insulated building, the distributor may recover from the installer the difference between the price the installer paid the distributor for the UFFI or the component ingredients of the UFFI in question and the purchase price paid by the retail purchaser to the installer for installation of UFFI into the building in question.

(2) If the manufacturer repurchases UFFI from an owner of a UFFI-insulated building, the manufacturer may recover from the distributor the difference between the price the installer paid the distributor for the UFFI or the component ingredients of the UFFI in question and the purchase price

paid by the distributor to the manufacturer for said UFFI or component ingredients of UFFI. Said manufacturer may also recover from the installer of the UFFI in question the difference between the purchase price paid by the retail purchaser to the installer and the price paid by the installer to the distributor.

(N) *Repurchase by Manufacturers*

In the event that component ingredients of UFFI made by more than one manufacturer are removed from a single building pursuant to a single retail sale of UFFI, all manufacturers of ingredients used in that retail sale shall pay equal shares of the cost of repurchase as follows:

(1) Any manufacturer who receives a "Certificate of Right to Repurchase" pursuant to 650.222(F) above shall repurchase UFFI as provided in 650.222(I) or (J) above;

(2) Said manufacturer shall have the right to recover a portion of the cost of repurchase from any other manufacturer(s) involved.

(O) *Notice that UFFI is Subject to Repurchase*

(1) All manufacturers of UFFI or component ingredients of UFFI shall notify each distributor, installer or other person to whom the manufacturer has sold UFFI or component ingredients of UFFI that UFFI is a banned hazardous substance subject to repurchase hereunder. This notice will provide instructions for repurchase of UFFI, and will advise that any distributor or installer who receives the notice is required to provide further notice as specified in this section. As soon as the distributor receives such notice, the distributor shall, in the same manner, similarly notify each distributor, installer or other person to whom the distributor has sold UFFI.

(2) Each manufacturer of UFFI or component ingredients of UFFI shall publicize a clear and conspicuous "Notice of Right to Repurchase" as follows, in a manner reasonably calculated to reach as many retail purchasers of UFFI as practicable:

NOTICE OF RIGHT TO REPURCHASE

The Commissioner of Public Health has banned urea-formaldehyde foam insulation (UFFI). If you have UFFI installed in your building and any occupant or former occupant has experienced adverse health symptoms after installation of UFFI, you may be able to require that UFFI be removed at the expense of the manufacturer, distributor or installer and that your purchase price be refunded. For further information concerning your rights, you may contact George Berlow, Department of Public Health, Room 770, 600 Washington Street, Boston, MA 02111 (617/727-2660).

(P) *Other Rights and Liabilities*

Nothing in this section shall be construed as affecting the rights and liabilities of any person other than those rights and liabilities stated in this section. No remedies allowed by this section shall be deemed exclusive.

(105 CMR 650.223 through 650.889 Reserved)

650.990: Severability

Any section, subsection, paragraph or provision of this chapter declared illegal or unconstitutional by a court of competent jurisdiction is severable from this chapter.

SEE COMPANION CASE

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No. 83-344

In The

Supreme Court of The United States

October Term, 1983

THE FORMALDEHYDE INSTITUTE, INC. and BORDEN, INC.,

Petitioners,

v.

BAILUS WALKER, JR.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Preliminary Statement

On August 30, 1983, petitioners The Formaldehyde Institute, Inc. and Borden, Inc. filed their Petition for a Writ of Certiorari ("Petition") to obtain review of the decision of the Massachusetts Supreme Judicial Court upholding regulations which banned urea-formaldehyde foam insulation ("UFFI") and which required the removal of UFFI from houses into which it had been installed. On September 29, 1983, the Massachusetts Commissioner of Public Health ("Commissioner") filed his Brief in Opposition to the Petition ("Brief"). Petitioners submit this Reply Brief to correct some of the misconceptions and errors contained in the Commissioner's Brief.

I. The Commissioner's Contention that Petitioners Were Afforded Procedural Due Process Is Contrary to This Court's Decisions and Is Refuted by the Record in This Case.

The Commissioner banned the sale of UFFI, and required its removal from houses into which it had been installed without ever affording petitioners an adjudicatory hearing as required by the United States Constitution. The Commissioner defends his denial of petitioners' constitutional rights on five specific grounds—(1) whatever procedures are afforded by state statute provide, by definition, all the process that is due (Brief, p. 15); (2) by doing business in Massachusetts petitioners assumed the risk of being subjected to the procedures, however arbitrary, set forth in the Massachusetts statute (*id.*, pp. 16-17); (3) notwithstanding express statutory provisions requiring that certain adjudicative facts be found to exist before the Commissioner could ban petitioners' product or order its repurchase, the regulations in this case were a legislative determination requiring no adjudicatory hearing (*id.*, pp. 20-22); (4) notwithstanding the trial court's express findings to the contrary, an adjudicatory hearing would be impracticable or futile (*id.*, pp. 23-28); and (5) if any right to an adjudicatory hearing existed, the trial in the Superior Court met that requirement (*id.*, pp. 29-30). Each of these contentions is either contrary to this Court's decisions or refuted on the face of the record in this case.

The Requirements of Due Process are a Matter of Federal, not State, Law. The Commissioner advances the extraordinary claim that the procedures chosen by the State to regulate business are essentially immune from review under the due process clause. Citing *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982), the Commissioner states that "[t]he 'legislative process' by which the Commonwealth banned that product 'provides all the process that is due. . .' " (Brief, p. 15). The Commissioner's sweeping proposition is refuted by the very case on which he purports to rely. The Court in *Logan* invalidated a state statute pre-

cisely because the procedures provided in the statute were constitutionally inadequate. *Id.* at 432-33. This Court recognized in the passage cited by the Commissioner that a State is free to create or not to create substantive property interests, but once such property rights exist, "minimum [procedural] requirements [are] a matter of federal law," and are not diminished by the fact that the State may have specified its own lesser procedures. *Id.* at 432, quoting *Vitek* v. *Jones*, 445 U.S. 480, 491 (1980).

Neither are petitioners' constitutional rights diminished by the fact that the statute under which the Commissioner acted has been on the books since 1961. The Commissioner's suggestion (Brief, pp. 16-17) that petitioners assumed the risk of being subjected to the agency's unconstitutional procedures would, if accepted, "allow the State to destroy at will virtually any state-created property interest." *Logan* v. *Zimmerman Brush Co.*, *supra*, 445 U.S. at 432.[1]

The Commissioner's Action Was Essentially Adjudicatory, and an Adjudicatory Hearing Was Readily Feasible. The Commissioner asserts that his regulations established a legislative-type rule requiring no adjudicatory hearing (Brief, pp. 20-22). But the Commissioner's argument is contradicted by the express language of the Massachusetts statute and the record in this case, which demonstrate that the Commissioner's action depended on the existence of specific, individualized facts that could not be rationally determined except through the adjudicatory procedures that petitioners sought. Where adverse administrative action is

[1]The Commissioner's reliance on *New Motor Vehicle Board* v. *Orrin W. Fox Co.*, 439 U.S. 96 (1978), is also misplaced. The Court in that case sustained a state statute that required that automobile dealers be afforded notice and opportunity for a hearing before a manufacturer could open a new dealership in the same market. The only question was whether a manufacturer was entitled to a prior hearing, not whether, as in this case, a manufacturer could be denied property without ever being afforded a hearing. *Id.*, pp. 104-106.

predicated on such adjudicative facts, this Court's decisions plainly require an adjudicatory hearing at some point. (Petition, pp. 15-17).[2]

The Commissioner's related assertion (Brief, p. 23) that petitioners have failed to show that the ban and repurchase regulations directly affected a small number of manufacturers and that an adjudicatory hearing was feasible is false and misleading.[3] First, the trial court found, and the Supreme Judicial Court did not dispute, that the manufacturers of UFFI, the "targeted group," were "small" in number (C 15) and "an easily identifiable and non-diverse group" (C 16). Second, the trial court expressly found that an evidentiary hearing where petitioners could cross-examine witnesses under oath and present relevant and material evidence was feasible: "Feasibility is essentially a question of fact. Here the facts are such that a hearing was clearly feasible" (C 14).[4]

Respondent's Assertion that the Trial in the Superior Court Afforded Petitioners an Adjudicatory Hearing is Spurious. If the

[2]This Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), on which the Commissioner relies, is not relevant to this case. The regulation at issue in that case concerned general methods to be applied by the Nuclear Regulatory Commission in licensing proceedings to assess certain kinds of environmental effects. Unlike this case, no license or other personal property interest was determined by the rule. Therefore, no one disputed that the regulation was the product of rulemaking or that adjudicatory procedures were required by the Constitution. *Id.*, at 442 n.16.

[3]The Commissioner at footnote 16 asserts, without any basis, that "many" of The Formaldehyde Institute's members were "presumably in the UFFI business." In fact, only petitioner Borden among the 62 Institute members manufactured the components of a foam insulation, and only seven other companies manufactured formaldehyde for any purpose.

[4]The Commissioner further argues at page 27 of his brief that an adjudicatory hearing would have been "futile" because even if he "had managed to corral the entire UFFI industry into one hearing room and

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trial court had been permitted to base its judgment on a review of all of the evidence developed through cross-examination at trial, as it first did, the hearing before that court would have satisfied due process. In that event, the decision whether or not to ban UFFI and order its repurchase would have been the result of a sufficient adjudicatory hearing. In overturning the trial court's judgment for the petitioners, however, the Supreme Judicial Court nullified the decision in this case reached after the required adjudicatory hearing. On appeal, the court determined that the trial court could set aside the Commissioner's decision only if it "lacked any rational, conceivable basis" (A17-18) thereby prohibiting the trial court from conducting a meaningful hearing. But the Constitution requires that an adjudicatory hearing be conducted by the decision-maker. The Commissioner's failure to hold an adjudicatory hearing is not cured by speculating, as the Supreme Judicial Court did, that the Commissioner might have reached the same decision if he had followed constitutionally sufficient procedures. A judicial hearing narrowed as it was by the Supreme Judicial Court is simply not "an opportunity . . . at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965), to present evidence to the decision-maker that UFFI was not a "hazardous-substance."[5]

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then issued a regulation, that regulation would . . . be ineffective against any new corporate 'person' which subsequently entered the UFFI business." This contention is frivolous. The Constitution requires a meaningful opportunity to be heard. It does not require the State to make certain that every person who may be affected by the State's action take advantage of the opportunity provided. All the Commissioner was required to do by the Constitution is give notice and provide an opportunity for an adjudicatory hearing.

[5]In fact, contrary to the Commissioner's statement, petitioners won in the trial court. And the fact that petitioners prevailed at trial demonstrates that where a decision concerning the hazardousness of UFFI was based on a full record after an adjudicatory hearing where cross-examination was permitted, a reasonable decision-maker could not sustain a ban and repurchase of the product.

II. The Commissioner's Contention That There Was A Rational Basis For The Ban And Repurchase Regulations Is Without Foundation.

At page eight of his brief, the Commissioner asserts that the ban and repurchase regulations are rational because in the words of the Supreme Judicial Court "there was evidence before the judge *indicating that UFFI would potentially in some conditions emit formaldehyde* into houses at levels above which at least a significant portion of the population would experience adverse health effects" (A 25). That UFFI has "the potential in some conditions" to emit levels of formaldehyde that may affect some people does not provide a rational basis for the Commissioner's ban and repurchase regulations.[6] Indeed, the Commissioner's reliance on such a statement merely highlights the total lack of evidence justifying his action. It must be remembered that formaldehyde is found in all human environments. "It is present in every cell in the human body and in the atmosphere." *Gulf South Insulation* v. *CPSC*, 701 F.2d 1137, 1140 (CA 5 1983). To justify ban and repurchase regulations on the ground that the product has the potential to release a common chemical that may affect some people at some level would mean that the Commissioner would have authority to ban virtually any chemical in commercial use.[7]

A product cannot rationally be banned when no effort has been made to determine what, if any, risk of harm or discomfort is as-

[6]The trial court expressly found: ". . . [T]here is no rational basis upon which one may conclude that it is likely that significant numbers of persons will experience . . . 'substantial' injury or illness as the proximate result of formaldehyde exposure from UFFI insulation when it is properly installed" (C 18).

[7]*Cf. Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 633-64 (1980) (Burger, C.J., Concurring) ("When the administrative record reveals only scant or minimal risk of material health impairment, responsible administration calls for avoidance of extravagant, comprehensive regulation. Perfect safety is a chimera; regulation must not strangle human activity in the search for the impossible.")

sociated with use of the product. The Commissioner, however, made no attempt to determine whether UFFI posed a significant risk of injury to the people of Massachusetts because of the product's alleged emission of formaldehyde. At no time did the Commissioner attempt to determine the amount of formaldehyde that UFFI contributed to the indoor environment, the levels of formaldehyde in UFFI houses compared with non-UFFI houses, how many people were affected by UFFI, or whether more people experienced physical symptoms in UFFI houses than in houses without UFFI. Moreover, repurchase of UFFI is required by the Commissioner's regulations even if the formaldehyde level in a particular UFFI home is less than the formaldehyde level in the outside air. As the trial court concluded: "[F]or an agency to promulgate administrative regulations rooted in ignorance, leaving the important issues of causal connection and contribution and incident rates unanswered and, indeed, even unexplored, is to perform its agency function in an irresponsible and totally arbitrary manner" (C 17).

The ban and repurchase regulations are irrational because the Commissioner chose to remain ignorant of crucial facts regarding the alleged hazard posed by UFFI. The Commissioner's conclusion that UFFI may cause substantial injury is afflicted by the same fatal flaw that lead the Fifth Circuit to set aside the Consumer Product Safety Commission's finding that UFFI posed an unreasonable risk of injury: "The failure to quantify the risk at the exposure levels actually associated with UFFI is the finding's Achilles heel. Predicting how likely an injury is to occur, at least in general terms, is essential to a determination of whether the risk of that injury is unreasonable."* *Gulf South Insulation, supra,*

*The Commissioner's reliance on *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) is misplaced. *Clover Leaf* involved a challenge to a state statute banning the use of plastic nonreturnable, nonrefillable containers on the ground that the statute violated the Equal Protection Clause of the Fourteenth Amendment. Petitioners here do not claim

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701 F.2d at 1148. The Commissioner's actions were arbitrary precisely because he acted without knowledge, or a rational basis to believe, that UFFI was likely to threaten any harm.

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that the regulations at issue are unconstitutional because the Commissioner singled out UFFI rather than many other household products that may emit formaldehyde. Moreover, in *Clover Leaf* there was "no serious doubt" that the plastic containers caused environmental problems, and thus no substantial question that their ban was reasonably related to a permissible goal. In contrast, in this case there is no reasonable evidence supporting a conclusion that UFFI poses a hazard such that it should be banned and removed from houses into which it has been installed.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted and the decision of the Massachusetts Supreme Judicial Court reversed.

Respectfully submitted,

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